

Arbitrating Wrongful Death Claims for Nursing Home Patients: What is Wrong with this Picture and How to Make it “More” Right

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I. INTRODUCTION

Consider the following example: an elderly patient with advanced Alzheimer's disease dies after being beaten and raped while in an assisted living facility.¹ The beneficiaries bring a wrongful death claim against the owner of the facility.² The facility then seeks to compel arbitration of the claim based on the arbitration clause in the patient's admissions contract.³ The court responds by ordering the dispute to arbitration, over the objection of the beneficiaries.⁴

Because the above example invokes genuine sympathy for the family involved and may result in a potentially large award for the beneficiaries, the facility likely does not want the case to be tried by a jury of peers. Many nursing homes already face significant financial challenges with complex Medicare payment systems that often leave them with hefty bills and no one to pay.⁵ However, no amount of financial difficulty justifies inserting a provision in an admissions contract that waives the right to a jury trial for unanticipated, negligent acts leading to death.

Predispute mandatory arbitration agreements inclusive of wrongful death nursing home claims are simply wrong. The validity of any such agreement in a health care setting presents serious problems due to the vulnerability of patients, the patient's immediate need to receive health care services, the lack of meaningful choice of facilities under which to receive care, and the disparity of power.⁶ The problems with the agreements in wrongful death actions are greatly increased when considering the gross negligence that may be involved, which cannot be anticipated by either the patient or the patient's family.⁷

1. *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 575 (Fla. Dist. Ct. App. 2007).

2. *Id.*

3. *Id.* at 576.

4. *Id.* at 579.

5. MEDICARE PAYMENT ADVISORY COMMISSION (MEDPAC), REPORT TO CONGRESS: MEDICARE PAYMENT POLICY (Mar. 2008), http://www.medpac.gov/documents/Mar08_EntireReport.pdf (making recommendations to Congress regarding changes to Medicare payment policies in a 379 page report reflecting the complexity of the Medicare system); Thomas Day, *About Nursing Homes*, http://www.longtermcarelink.net/eldercare/nursing_home.htm (last visited Aug. 10, 2008) (discussing problems facing nursing homes including the rising costs of care due to lawsuits as well as a shortage of staff which may lead to negligent care).

6. See Laura M. Owings & Mark N. Gelle, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, TENN. BAR J. 20 (March 2007).

7. See *supra* notes 1-4 and accompanying text (providing an example of gross negligence on the part of the nursing home).

Challenges to all mandatory arbitration agreements are on the rise.⁸ Similarly, challenges to mandatory arbitration agreements in nursing home contracts have increased, with a plethora of litigation from 2005 to the present.⁹ The single largest reason for the increase appears to be challenges to arbitration clauses involving wrongful death claims, which have tripled since 2005. In twelve of the cases litigated in 2007, six upheld arbitration provisions, some by severing unconscionable portions, and six declared the arbitration agreements unenforceable.¹⁰ These cases reveal a split of court opinion regarding mandatory arbitration

8. F. Paul Bland, Leslie Bailey, & Michael Lucas, *Selected Arbitration Decisions Since September 2005*, Practising Law Institute: Corporate Law and Practice Course Handbook Series, Order No. 11165 399, 403 (Mar.-May 2007). The increase in nursing home litigation in the last five to ten years mirrors that of all challenges to the enforcement of mandatory arbitration clauses. *Id.* In the last two years, more than 500 new judicial opinions on mandatory arbitration have been published. *Id.*

9. *See* MN MedInvest Co., L.P. v. Estate of Nichols *ex rel.* Nichols, 908 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 2005) (upholding an arbitration clause in a suit brought on behalf of a minor child by her mother for wrongful death, negligence, and breach of fiduciary duty); Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 525 (Miss. 2005) (finding that an arbitration clause was not unconscionable and therefore enforceable in a wrongful death action); Gullede v. Trinity Mission Health & Rehab of Holly Springs, LLC, No. 3:07CV008-M-A, 2007 WL 3102141 (N.D. Miss. Oct. 22, 2007) (finding that the signature of the patient's daughter on the arbitration agreement was binding since her mother was incapacitated and, thus, upholding the arbitration agreement). *Compare with* Noland Health Services, Inc. v. Wright, 971 So. 2d 681, 690 (Ala. 2007) (finding, in a 5-3 opinion, that a daughter-in-law's signature as responsible party could not be interpreted as the patient's intent to be bound by an arbitration agreement in a wrongful death action); Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 309 (Fla. Dist. Ct. App. 2005) (holding that an arbitration clause was void against public policy in a negligent care action); Bedford Care Center-Monroe Hall, LLC v. Lewis, 923 So. 2d 998, 1002 (Miss. 2006) (holding that a conservator was not bound by an arbitration clause in a negligence action against the nursing home when he refused to sign the arbitration clause); *see also* Sylvia Hsieh, *Nursing Home Suits Heat Up*, LAWYERS USA, Mar. 24, 2008 (discussing the new flurry of litigation over mandatory arbitration provisions in nursing home admissions contracts).

10. For cases upholding arbitration agreements, see *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574 (Fla. Dist. Ct. App. 2007), *rev. denied*, 967 So. 2d 196 (Fla. 2007); *Miller v. Cotter*, 863 N.E.2d 537 (Mass. 2007); *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007); *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, at *2 (Miss. Ct. App. 2007), *cert. granted*, 977 So. 2d 1144 (Miss. 2008); *Gullede v. Trinity Mission Health & Rehab of Holly Springs, LLC*, No. 3:07CV008-M-A, 2007 WL 3102141 (N.D. Miss. Oct. 22, 2007).

For cases invalidating arbitration agreements, see *Noland Health Servs., Inc. v. Wright*, 971 So. 2d 681 (Ala. 2007); *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773 (Fla. Dist. Ct. App. 2007); *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. App. 2007); *Barnes v. Andover Vill. Ret. Cmty., Ltd.*, No. 2006-A-0039, 2007 WL 2296459 (Ohio Ct. App. Aug. 10, 2007); *Sikes v. Heritage Oaks W. Ret. Vill.*, 238 S.W.3d 807 (Tex. App. 2007), *rev. denied*, 238 S.W.3d 807 (Tex. 2008); *Texas Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345 (Tex. App. 2007).

agreements in nursing home wrongful death actions, and the need for courts to further clarify their jurisprudence. The increase in litigation also serves as a wake-up call for nursing homes to adjust their admissions procedures and agreements, and for legislatures to join in the debate concerning the validity of arbitration agreements in nursing home admissions contracts.¹¹

This article reviews the current increase in litigation surrounding wrongful death claims against nursing homes. First, the article briefly summarizes the history of the Federal Arbitration Act (“FAA”)¹² and its impact on state laws that govern arbitration agreements.¹³ Second, the article reviews current court interpretation of arbitration agreements in wrongful death actions against nursing homes in various jurisdictions, including the authority of the signor of the agreement, the applicable state or federal law governing the arbitration agreement, and the unconscionability of the agreement.¹⁴ Finally, the article proposes changes in current nursing home admissions contracts to make them at least “more” right. It first advocates that wrongful death claims be excluded from predispute mandatory arbitration agreements or, in the alternative, that nursing home admissions contracts be drafted with clear and just provisions that allow for important relief for beneficiaries when litigating a wrongful death claim.¹⁵

II. BACKGROUND

While courts in many states have not had the occasion to decide whether mandatory arbitration clauses in nursing home contracts are enforceable, other courts have decided the issue, with mixed results.¹⁶ The burden of showing a valid arbitration agreement is on the party seeking to enforce arbitration.¹⁷ In determining whether to compel arbitration, a court considers the following factors: the federal government’s policy favoring arbitration; whether the admissions contract is valid; whether the admissions contract is signed by a person in

11. Congress recently introduced legislation entitled the “Fairness in Nursing Home Arbitration Act” to address concerns over mandatory arbitration agreements in nursing home contracts, but the bill has yet to become law. S. 2838, 110th Cong. (2008).

12. 9 U.S.C. § 1-16 (2007).

13. See *infra* notes 16-30 and accompanying text.

14. See *infra* notes 31-207 and accompanying text.

15. See *infra* notes 208-335 and accompanying text.

16. *E.g.*, *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, LLC*, No. 3:07CV008-M-A, 2007 WL 3102141 (N.D. Miss. Oct. 22, 2007) (upholding an arbitration agreement). *Cf.* *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242 (Fla. Dist. Ct. App. 2006) (denying the nursing home’s motion to compel arbitration).

17. *E.g.*, *Pagarigan v. Libby Care Ctr., Inc.*, 120 Cal. Rptr. 2d 892, 894 (Cal. Ct. App. 2002); *In re Kepka*, 178 S.W.3d 279, 286 (Tex. App. 2005).

authority; and whether the arbitration agreement lacks procedural and substantive unconscionability. These issues will be discussed in the remainder of this article.

A. *Federal Law Governing Arbitration Agreements*

The United States Supreme Court has not directly addressed the enforceability of an arbitration clause in a health care contract.¹⁸ However, Congress has specifically supported arbitration through the Federal Arbitration Act (“FAA”), which underscores a strong federal policy favoring arbitration.¹⁹ The FAA establishes that “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁰

The Court determined that the purpose of the FAA was to “reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.”²¹ Furthermore, the Court established that questions regarding the enforceability of an arbitration agreement should be resolved in favor of arbitration.²² The Court broadly interpreted the phrase “involving commerce” in 9 U.S.C. § 2 as any activity “affecting commerce.”²³ Similarly, the Court held that “Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’”²⁴ The above examples reflect the Court’s readiness to apply the FAA to most any contract by finding that the subject matter relates to interstate commerce.

18. See Kathrine Kuhn Galle, *Comment: The Appearance of Impropriety: Making Agreements to Arbitrate in Health Care contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 984 (2004).

19. See 9 U.S.C. § 1-16 (2007).

20. 9 U.S.C. § 2.

21. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000); see also Elizabeth K. Stanley, *Parties’ Defenses to Binding Arbitration Agreements in the Health Care Field & The Operation of the McCarran-Ferguson Act*, 38 ST. MARY’S L.J. 591, 599 (2007).

22. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

23. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995).

24. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) (citing *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

B. *State Law Versus Federal Law*

Against the backdrop of the FAA, most states have FAA-companion legislation that governs the enforcement of arbitration agreements.²⁵ Like federal law, state companion laws similarly express a strong policy favoring arbitration and guide the courts to resolve doubts concerning the scope of arbitration in favor of arbitration.²⁶ However, a party cannot be compelled to arbitrate a dispute if it has not agreed by contract to arbitration.²⁷

In regard to whether federal or state law applies to a particular arbitration agreement, the Supreme Court held that the FAA preempts state laws that are more restrictive than the FAA but permits state laws that broaden the scope of the FAA.²⁸ According to the Court, states may regulate arbitration agreements under general contract law principles, including allowing for the contract defenses of fraud, duress, or unconscionability.²⁹ In addition to federal preemption issues, an arbitration agreement may be held void to the extent that it conflicts with state law.³⁰ Accordingly, an arbitration agreement may be subject to both state and federal laws and be found inapplicable under either.

25. *E.g.*, Minn. Stat. §§ 572.08-572.30 (2007).

26. *See, e.g.*, Kennedy, Matthews, Landis, Healy & Pecora, Inc. v. Young, 524 N.W.2d 752, 755 (Minn. App. 1994).

27. *See, e.g.*, Schoenborn v. State Farm Auto. Ins. Co., 495 N.W.2d 460, 463 (Minn. App. 1993).

28. *See* Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); *see also* Galle, *supra* note 18, at 978 (arguing that states may apply principles of contract law to determine the validity of a contract, but that the FAA preempts statutory schemes that are more restrictive).

29. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989). The Court applied California law, as stated in the contract, to stay the arbitration pending litigation against a third party. *Id.* However, the Court's holding is interpreted by some to be the minority view among many other Supreme Court holdings that definitively conclude that the FAA preempts state law. *See* THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 175-76 (West, 4th ed. 2007) (noting that the holding in *Volt* represents strict adherence to principles of contract). Carbonneau asserts that the "federalism trilogy" sets a strong precedent that the FAA preempts state law. *Id.* at 175-76 (citing the three cases in the trilogy as *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985)).

Cf. *Alexander v. Minnesota Vikings Football Club LLC*, 649 N.W.2d 464, 467 (Minn. App. 2002) (asserting that states may regulate contracts, and general contract principles apply to arbitration clauses); *Stanley, supra* note 21, at 607 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), as finding that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles").

30. *See, e.g.*, *Minnesota Cmty. College Faculty Ass'n v. State*, 562 N.W.2d 685, 689 (Minn. App. 1997) (denying a motion to compel arbitration between a faculty association and MnSCU regarding faculty appointments on the grounds that sole authority to make all faculty appointments was given to MnSCU under Minnesota Statute § 43A.06, subd. 1(c) (1994)).

III. CURRENT COURT INTERPRETATION OF ARBITRATION CLAUSES

Many state courts have not specifically addressed the validity of predispute mandatory arbitration agreements in nursing home contracts; however, an analysis of court decisions that have considered the issue serves as a guide to current court interpretation of arbitration clauses. In 2007, courts in Alabama,³¹ Florida,³² Georgia,³³ Massachusetts,³⁴ Mississippi,³⁵ Ohio,³⁶ Tennessee,³⁷ and Texas³⁸ decided the issue of the

31. *See* Carraway v. Beverly Enters. Ala., Inc., 978 So. 2d 27 (Ala. 2007) (upholding an arbitration agreement in a wrongful death action where the brother signed the admissions contract as “authorized agent” on behalf of his sister and the agreement was not unconscionable); Noland Health Servs., Inc. v. Wright, 971 So. 2d 681 (Ala. 2007) (affirming a denial of the nursing home’s motion to compel arbitration when finding that the daughter-in-law’s signature on the admissions agreement did not bind the patient to arbitration and that the administrator of the estate who brought suit did not manifest assent to the arbitration clause by previously filing a breach of contract complaint prior to the patient’s death).

32. *See* Place at Vero Beach, Inc. v. Hanson, 953 So. 2d 773 (Fla. Dist. Ct. App. 2007) (invalidating an arbitration agreement when the nursing home required the arbitration be governed by the American Health Lawyers Association, which required a finding of negligence under a clear and convincing evidence standard as opposed to a preponderance of the evidence standard as found in the Florida’s Nursing Home Resident’s Act); Alterra Healthcare Corp. v. Estate of Linton *ex rel.* Graham, 953 So. 2d 574 (Fla. Dist. Ct. App. 2007) (upholding an arbitration agreement, after severing a provision limiting damages, by finding that even though the patient did not sign the agreement, she was bound to it as an intended third-party beneficiary).

33. *See* Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430 (Ga. Ct. App. 2007) (finding an arbitration agreement was not enforceable against the patient’s estate when the husband had no authority to act as an agent of his wife when signing the admissions agreement).

34. *See* Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007) (upholding an arbitration agreement where the clause was well drafted and the son who signed the admissions contract understood the provision and possessed a durable power of attorney).

35. *See* Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So. 2d 732 (Miss. 2007) (severing a provision that limited damages but otherwise enforcing an arbitration agreement after finding it was not unconscionable); Trinity Mission of Clinton, LLC v. Barber, No. 2005-CA-02199-COA, 2007 WL 2421720 (Miss. Ct. App. Aug. 28, 2007) (holding that the arbitration agreement was binding against the patient and by extension her third-party beneficiaries in the wrongful death action).

36. *See* Barnes v. Andover Vill. Ret. Cmty., Ltd., No. 2006-A-0039, 2007 WL 2296459 (Ohio Ct. App. Aug. 10, 2007) (declaring the arbitration clause in the admissions contract unconscionable and unenforceable but remanding to allow the nursing home to present supplemental information that rebuts the unconscionability argument as required by statute).

37. *See* Owens v. Nat’l Health Corp., No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *4 (Tenn. Nov. 8, 2007) (holding that an arbitration agreement was a “health care decision” and thus the attorney-in-fact was authorized to enter into the agreement, but remanding the case to permit discovery on the issue of unconscionability).

38. *See* Sikes v. Heritage Oaks W. Ret. Vill., 238 S.W.3d 807 (Tex. App. 2007) (vacating an arbitration award because the wife had no authority to bind the patient to the admissions contract and allowing the wife of the deceased patient to proceed with a medical malpractice action); Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345

enforceability of predispute mandatory arbitration clauses in wrongful death claims. Federal courts also have recently begun to decide the issue of enforceability, using a similar analysis to that of state courts.³⁹ First, courts determine whether the FAA, another federal law, or a state law governs the arbitration agreement, generally holding that the FAA applies.⁴⁰ Second, courts apply a two-prong test that asks: (1) whether the arbitration agreement itself is valid; and (2) whether the disputed issue falls within the scope of the agreement.⁴¹

In regard to the first prong, courts consider several issues to determine whether the arbitration agreement in a nursing home contract is valid including: the authority of the signor of the admissions agreement, the formatting of the agreement, the admissions process, and the fairness of the terms.⁴² Most of the litigation concerns the first prong.⁴³ Few courts focus on the second prong when interpreting the validity of arbitration clauses in wrongful death claims, so it will not be fully discussed here.⁴⁴

A few courts add a third step in the analysis by determining whether one of the parties waived the right to arbitration or whether other legal considerations invalidate the arbitration agreement.⁴⁵ For example,

(Tex. App. 2007) (denying the nursing home's motion to compel arbitration when the daughter of the patient had no authority to bind the patient or the patient's estate when signing the nursing home agreement).

39. See *Beverly Enters.-Miss., Inc. v. Powell*, 244 F. App'x 577 (5th Cir. 2007) (reversing summary judgment for the plaintiff when it found that material facts existed as to whether the nursing home adequately explained the provisions of the admissions contract to an illiterate patient); *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, LLC*, No. 3:07CV008-M-A, 2007 WL 3102141, at *1 (N.D. Miss. Oct. 22, 2007) (finding an arbitration agreement enforceable against the signatory daughter as surrogate for her incapacitated mother).

Compare *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005), with *Beverly Enters.-Miss., Inc.*, 244 F. App'x 577 (following a similar analysis as prior state court decisions).

40. E.g., *Vicksburg Partners, L.P.*, 911 So. 2d 507 (representing the general rule that nursing home arbitration agreements affect interstate commerce in the aggregate and holding that the FAA applies).

41. See, e.g., *Gulledge*, 2007 WL 3102141, at *1; *Sikes*, 238 S.W.3d at 809; *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, at *2 (Miss. Ct. App. Aug. 28, 2007); see also *Stanley*, *supra* note 21, at 621.

42. *Stanley*, *supra* note 21, at 621-34; see also Christopher B. Hopkins, *The Perils of Enforcing "Favored" Arbitration*, 24 No. 1 TRIAL ADVOC. Q. 30, 34-40 (2005).

43. For a discussion on how the courts determine validity, see *infra* notes 47-205 and accompanying text.

44. See, e.g., *Trinity Mission of Clinton, LLC*, 2007 WL 2421720, at *7 (interpreting the language in the arbitration agreement of "all claims . . . shall be resolved by binding arbitration" as encompassing the plaintiff's wrongful death claim and, thus the claim fell within the scope of the agreement).

45. *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 577 (Fla. Dist. Ct. App. 2007). The three-prong test in Florida is: "(1) whether a valid written

Florida's Third District Court of Appeals recently held that a nursing home waives its right to arbitration in a wrongful death action by engaging in extensive discovery prior to moving to compel arbitration.⁴⁶

A. *Applicable Federal or State Law*

As a preliminary matter, courts must determine whether the FAA, another federal law, or a state law applies to the arbitration agreement. In order for the FAA to apply, the arbitration agreement must "affect interstate commerce."⁴⁷ Relying on the United States Supreme Court's broad interpretation of commerce, courts have generally held nursing home contracts to be transactions involving "interstate commerce."⁴⁸

However, courts have held that the FAA does not apply when it is: (1) preempted by another federal law; or (2) preempted by state law.⁴⁹ In *Bruner v. Timberland Manor, L.P.*,⁵⁰ the patient's daughter signed an arbitration agreement, which stated in at least eight different places that "the laws of the State of Oklahoma" governed the agreement.⁵¹ The nursing home presented evidence showing its operations entailed interstate commerce.⁵² However, the court found that the nursing home did not engage in interstate commerce, noting that neither Congress nor the United States Supreme Court have declared that Medicare or Medicaid funding is an exercise of Congress' Commerce Clause power.⁵³

agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Id.* Mississippi has a similar third step that asks, "whether legal constraint external to the parties' agreement foreclosed arbitration of those claims." *Trinity Mission of Clinton, LLC*, 2007 WL 2421720, at *2 (quoting *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002)). For a similar case, see *Gulledge*, 2007 WL 3102141, at *1 (referring to a similar prong of whether "any federal statute or policy renders the claims nonarbitrable"); *Beverly Enters.-Miss., Inc. v. Powell*, 244 F. App'x 577, 579 (5th Cir. 2007) (using a similar test).

46. *Estate of Orlanis ex rel. Marks v. Oakwood Terrace Skilled Nursing & Rehab. Ctr.*, 971 So. 2d 811, 812 (Fla. Dist. Ct. App. 2007) (engaging in interrogatories, requests for document production, and notices of production to non-parties).

47. 9 U.S.C. § 1-16 (2007). *See supra* notes 23-24 and accompanying text.

48. *See, e.g., Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 515 (Miss. 2005) (applying the aggregate affects test and finding nursing homes receive supplies from out-of-state vendors and payments from out-of-state insurance companies, including Medicare/Medicaid); *Trinity Mission of Clinton, LLC*, 2007 WL 2421720, at *2 (citing *Stephens*, 911 So. 2d at 515).

49. *See infra* notes 49-69 and accompanying text.

50. *Bruner v. Timberlane Manor, L.P.*, 155 P.3d 16 (Okla. 2006).

51. *Id.* at 30 (noting that the patient died of malnutrition).

52. *Id.* at 26-31.

53. *Id.* at 29-30. The court expounded that the federal government utilizes "health and safety" regulations under the SSA to monitor Medicaid programs at the state level. *Id.* at 26. Thus, because federal funds are withheld unless states comply with certain regulations, Congress is exercising its spending power, not its commerce power. *Id.* Many of the Medicaid requirements are left to the states to legislate as they see fit, such

One justice wrote that, “[t]he nursing home admission contract in this case involves a profoundly local transaction—in-state nursing home care provided to an Oklahoma individual by an Oklahoma entity licensed under Oklahoma law.”⁵⁴

Moreover, the court determined that the FAA may be preempted by conflicting federal law, and thus found that the Social Security Act (“SSA”) regulating Medicaid provisions was the governing law in the case.⁵⁵ Consequently, under the SSA, the court allowed state law to apply to judicial review of health care contracts.⁵⁶ By ultimately finding that state law applied, the court then favored the language of the more specific Oklahoma Nursing Home Care Act (“NHCA”), which precluded waiver of rights for negligent acts, over the FAA state-counterpart, the Oklahoma Uniform Arbitration Act.⁵⁷ Under the NHCA, the court found that the waiver of a right to a jury trial was null and void; therefore, it held the arbitration agreement unenforceable.⁵⁸

The court in *In re Kepka*⁵⁹ found that the federal McCarran-Ferguson Act (“MFA”) prevented FAA preemption of notice requirements in a state statute.⁶⁰ The court held that the nursing home contract “regulated the business of insurance” as required by the MFA.⁶¹ Because the MFA applied, the FAA could not be used to preempt a state statute requiring that the arbitration agreement contain written notice in

as whether binding arbitration will be permitted. *Id.* Since states are given authority to enact certain Medicaid regulations and Congress is exercising its spending power, not its commerce power, the court concluded that the SSA, and by extension state law, applied. *Id.* at 31.

54. *Id.* at 31-32. The court summarized its reasons for finding the FAA did not apply as: (1) the arbitration agreement specified that Oklahoma law would govern; (2) Congress regulates nursing homes through its spending power, not commerce power; (3) Congress’ nursing home regulations leave decisions regarding judicial review of nursing home claims up to the states; and (4) insufficient evidence exists to connect the admissions contract with interstate commerce. *Id.* at 32.

55. *Id.* at 24-26. The court stated that “like any statutory directive the FAA’s mandate may be overridden by a contrary congressional command.” *Id.* at 25 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987)).

56. *Bruner v. Timberlane Manor, L.P.*, 155 P.3d 16, 31 (Okla. 2006). The court pointed to a memorandum from the Centers for Medicare & Medicaid Services that stated, “[u]nder Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted. . . .” *Id.* at 26; *see also* § 1919(c)(2), (f)(3); 42 U.S.C. § 1369r(c)(2), (f)(3); 42 C.F.R. § 431.245 (2007) (the Social Security Act and corresponding regulations).

57. *Bruner*, 155 P.3d at 25.

58. *Id.* at 31.

59. *In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005).

60. *Id.* at 287-88.

61. *Id.* at 288 (finding that the purpose of the act is to protect the relationship between the insured and the insurer that provided, in this case, medical insurance).

ten-point boldface type explaining that the agreement to arbitrate was a waiver of rights.⁶²

In addition to determining that other federal law may preempt application of the FAA, at least two courts have elected to apply state law, as opposed to the FAA, by pointing to the fact that the FAA was not intended to preempt all state law governing arbitration.⁶³ In *Owens v. National Health Corp.*,⁶⁴ the court summarily held that Tennessee law, not the FAA, applied by the party's own terms in the contract.⁶⁵ The court cited the United States Supreme Court in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*⁶⁶ to support its position that the parties may elect to apply state law by agreement.⁶⁷

The Supreme Judicial Court of Massachusetts elected to apply the Massachusetts Arbitration Act, finding that “[t]he Massachusetts Act applies here by . . . plain terms [of the Act],” although the court noted that the FAA likely applied as well.⁶⁸ Notably, the court applied state law even though the parties had not specified in the contract that Massachusetts law would govern the agreement.⁶⁹ Additionally, the court found that the parties may not force a contract to come under the purview of the FAA by merely stating in the contract that the agreement

62. *Id.* at 287. The state statute invalidated an arbitration agreement unless the following notice was printed:

UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

Id.

63. See *Miller v. Cotter*, 863 N.E.2d 537, 544 (Mass 2007); *Owens v. Nat'l Health Corp.*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *4 (Tenn. Nov. 8, 2007).

64. *Owens*, 2007 WL 3284669, at *4.

65. *Id.* (noting that the terms of the contract state that the arbitration agreement is to be governed by the “laws of the state where the Center is licensed,” which was Tennessee).

66. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

67. *Owens*, 2007 WL 3284669, at *4 (citing *Volt*, 489 U.S. at 479); see also *supra* notes 28-29 and accompanying text.

68. *Miller*, 863 N.E.2d at 544. The court found the Massachusetts Act to be companion legislation to the FAA and found nothing in United States Supreme Court opinion or state statute that would cause the Massachusetts Act to be contrary to the FAA. *Id.* at 543-44 (citing Mass St. 1960, ch. 374, § 1, codified, as amended, at GEN. LAWS ch. 251).

69. *Id.* at 541 (stating that the arbitrator's decisions “shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action”).

“affects interstate commerce,” but that a finding of interstate commerce required a constitutional inquiry.⁷⁰

B. *Validity of Arbitration Agreement*

After determining the applicable law, the court must then find that a valid contract exists using ordinary principles of contract law.⁷¹ The court focuses on several issues when determining validity: (1) the authority of the signor; (2) procedural unconscionability; (3) substantive unconscionability; and (4) other legal arguments.⁷²

1. Authority of the Signor

The authority of the person signing the arbitration agreement is the most troublesome issue in nursing home wrongful death claims.⁷³ There are currently two lines of disagreement among court opinions: (1) whether the person signing the agreement has authority to act on the patient’s behalf and bind the patient to the arbitration agreement; and (2) whether, in turn, the signature also binds third-party beneficiaries of the wrongful death action.⁷⁴ The second disagreement is unique to wrongful death actions because of the derivative nature of the cause of action.⁷⁵

70. *Id.* at 544. The court found that the contract involved interstate commerce. *Id.* However, the court found that just because the contract stated that it “evidences a transaction involving interstate commerce governed by the Federal Arbitration Act,” did not artificially make it so. *Id.* at 540, 544 n.13.

71. *See, e.g.,* Landers v. Integrated Health Servs. of Shreveport, 903 So. 2d 609, 612 (La. Ct. App. 2005) (listing the requirements for formation of a valid contract as “capacity, consent, a certain object, and a lawful cause”); Trinity Mission of Clinton, LLC v. Barber, No. 2005-CA-02199-COA, 2007 WL 2421720, at *2 (Miss. Ct. App. August 28, 2007) (applying “ordinary principles of contract law” to determine the validity of an arbitration provision), *cert. granted*, 977 So. 2d 1144 (Miss. 2008); *see also supra* note 41 and accompanying text.

72. *See infra* notes 187-207 and accompanying text (reviewing each of the issues the court analyzes to determine validity).

73. *See infra* notes 75-151 and accompanying text.

74. *Id.*

75. TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(a) (Vernon Supp. 2005); Bangert v. Baylor Coll. of Med., 881 S.W.2d 564, 566 (Tex. App. 1994); Avila v. St. Luke’s Lutheran Hosp., 948 S.W.2d 841, 849-50 (Tex. App. 1997); Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 347 (Tex. App. 1992); Richardson v. Monts, 81 S.W.3d 889, 892-893 (Tex. App. 2002); *see also* Stanley, *supra* note 21, at 630 (stating that a wrongful death action is purely derivative and can only be brought if “the individual injured would have been entitled to bring an action for the injury if the individual had lived”).

i. Attorney-in-Fact as Signor

Generally, if a person with legal authority to bind the plaintiff, such as a durable power of attorney, signs a document containing an arbitration clause, then the clause is enforceable using statutory analysis to resolve questions of authority and capacity.⁷⁶

In the recently appealed case, *Owens v. National Health Corp.*, the Supreme Court of Tennessee held that the attorney-in-fact, who possessed a durable power of attorney, was authorized to enter into a binding arbitration agreement on behalf of the patient.⁷⁷ The court found that under Tennessee law, the nursing home contract was a “health care decision” and under the scope of the authority of the attorney-in-fact.⁷⁸ However, because the trial court denied the defendant’s motion to compel arbitration, the issue of whether the contract was unconscionable was never fully explored.⁷⁹ Thus, the court remanded the case to allow the plaintiff time to conduct additional discovery on the issue of unconscionability.⁸⁰

Similarly, in *Miller v. Cotter*,⁸¹ the Supreme Judicial Court of Massachusetts held that an arbitration agreement was enforceable against the son of the deceased patient when the son possessed a durable power of attorney and a valid health care proxy for his father.⁸² The court also found it significant that Miller had executed several admissions contracts in the past for his ninety-one year old father and that his father was incapacitated.⁸³

76. See *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004) (finding that the nursing home agreement containing an arbitration clause signed by an attorney-in-fact was binding on the estate of the deceased patient in a wrongful death action); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004) (holding an arbitration clause binding in a wrongful death claim when the patient’s attorney-in-fact signed the admission agreement under a limited durable power of attorney, which granted authority to “admit or release [the patient] from any hospital or health care facility”); *Hopkins*, *supra* note 42, at 34 (noting, for example, that Florida Statute § 744.441 specifically grants authority of the principal to enter into contracts).

77. *Owens v. Nat’l Health Corp.*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *1, *7 (Tenn. Nov. 8, 2007). The power of attorney authorized the attorneys-in-fact “to ASSIST [the patient] in making health care decisions . . . if [the patient is] incapacitated. . . .” *Id.* at *1 (citing TENN. CODE ANN. § 31-11-105 (2001)).

78. *Id.* The court reasoned that “the decision to admit [the patient] to the nursing home clearly constitutes a health care decision.” *Id.* at *5 (citing TENN. CODE ANN. § 34-6-201(2)-(3) (2001)).

79. *Id.* at *11 (finding that the trial court’s decision that the attorney-in-fact lacked requisite authority to bind the patient to arbitration pretermitted additional discovery of whether the contract was unconscionable).

80. *Id.*

81. *Miller v. Cotter*, 863 N.E.2d 537 (Mass. 2007).

82. *Id.* at 540.

83. *Id.*

ii. Personal Representative as Signor

Although the determination is less clear than when signed as an attorney-in-fact, case law favors the enforceability of arbitration agreements when signed by a personal representative.⁸⁴ While the term “personal representative” holds little meaning in and of itself, the key inquiry is whether the signatory possessed the requisite authority.⁸⁵

In *MN MedInvest Company, L.P. v. Estate of Nichols ex rel. Nichols*,⁸⁶ a mother who signed an admissions contract on behalf of her minor child that contained an optional arbitration clause, sued the nursing home for wrongful death, negligence, and breach of fiduciary duty.⁸⁷ The court found that although public policy favors protection of children from waiver of rights by their parents, an exception is made in the procurement of medical care.⁸⁸ The court held that under the doctrine of necessities, the child was bound by the terms of the contract, including the arbitration provision.⁸⁹ The court also noted that the contract provided for the mother to mark an “x” through the optional arbitration clause if she did not want to be bound by its provisions, but that she did not cross out the clause.⁹⁰ Consequently, the court upheld the arbitration agreement.⁹¹

In contrast, another court decided that a personal representative lacked sufficient authority to bind a patient to arbitration.⁹² In *Noland Health Services, Inc. v. Wright*,⁹³ the Alabama Supreme Court held that an arbitration clause was unenforceable in a wrongful death claim brought by the administrator of a deceased patient’s estate.⁹⁴ The patient’s daughter-in-law signed the nursing home contract as a “responsible party”; however, the daughter-in-law never had the power of attorney and the administrator bringing the action never signed the agreement.⁹⁵

84. See Hopkins, *supra* note 42, at 34.

85. See *id.* (stating that “[i]f the signor has patent legal authority to bind the plaintiff . . . then statutory analysis typically resolves the question of capacity and authority”).

86. *MN MedInvest Co., L.P. v. Estate of Nichols ex rel. Nichols*, 908 So. 2d 1178 (Fl. Ct. App. 2005).

87. *Id.* at 1179.

88. *Id.* (citing *Shea v. Global Travel Mktg., Inc.*, 870 So. 2d 20 (Fla. Dist. Ct. App. 2003), *quashed* 908 So. 2d 392 (Fla. 2005)).

89. *Id.*

90. *Id.*

91. *Id.*

92. See *Noland Health Servs, Inc. v. Wright*, 971 So. 2d 681 (Ala. 2007).

93. *Id.*

94. *Id.* at 690.

95. *Id.* at 685-87.

iii. Health Care Proxy/Medical Power of Attorney as Signor

Often patients grant power to another individual to make “health care decisions” on their behalf; but courts have struggled with what constitutes a “health care decision.”⁹⁶

In *Blankfeld v. Richmond Health Care, Inc.*,⁹⁷ an arbitration clause in an admissions contract was not binding on a patient whose son signed the contract as a statutory health care proxy.⁹⁸ The court found that the arbitration clause was not a “health care decision” for an incapacitated or developmentally disabled patient who had no health care directive, as proscribed by Florida Statute § 765.401 (2001).⁹⁹ Furthermore, the statutory scheme did not grant the proxy the authority to sign any waiver or release, such as waiving a jury trial, when making health care decisions.¹⁰⁰ Health care decisions for incapacitated persons were defined by the state legislature as those relating to life-prolonging procedures, application of medical benefits, access to medical records, and anatomical gifts.¹⁰¹ The court held that a proxy is not authorized to waive the right to trial by jury or common law remedies.¹⁰²

Reaching a similar result in *Texas Cityview Care Center, L.P. v. Fryer*,¹⁰³ the court held that a daughter who possessed a “medical power of attorney” to make health care decisions on behalf of the patient lacked requisite authority to bind the patient to the arbitration agreement.¹⁰⁴ Two reasons led to the court’s decision. First, under the language of the Texas statute, the medical power of attorney is not effective until a doctor certifies that the patient is unable to make medical decisions on his or her own.¹⁰⁵ The court found no certification or evidence of incompetence.¹⁰⁶ Second, a medical power of attorney grants authority to another to make health care decisions, which are defined in a Texas statute as “consent, refusal to consent, or withdrawal of consent to health care, treatment, service, or a procedure to maintain, diagnose, or treat an individual’s physical or mental condition.”¹⁰⁷ The court specifically

96. See *infra* notes 97-108 and accompanying text.

97. *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. Dist. Ct. App. 2005).

98. *Id.* at 301.

99. *Id.* at 300.

100. *Id.*

101. *Id.* (citing FLA. STAT. § 765.101(5) (2001)).

102. *Id.* at 301.

103. *Tex. Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345 (Tex. App. 2007).

104. *Id.* at 353.

105. *Id.* at 352 (citing TEX. HEALTH & SAFETY CODE § 166.152(b) (Vernon 2007)).

106. *Id.*

107. *Id.* (citing TEX. HEALTH & SAFETY CODE § 166.002(7) (Vernon 2007)).

found that waiving a legal right to a jury trial was not a “health care decision” as intended under the statutory definition.¹⁰⁸

iv. Statutory or Surrogate Signor

Some states allow family members to sign the admissions contract for the patient.¹⁰⁹ A determination of whether the signature of a family member not acting with legal authority is binding hinges on whether the patient lacks capacity to sign.¹¹⁰ If the patient is determined by the court to be incapacitated, the court may in turn find that a relative who signs on the patient’s behalf as a surrogate binds the patient to the arbitration agreement.¹¹¹

In *Covenant Health Rehab of Picayune, L.P. v. Brown*,¹¹² the court upheld an arbitration agreement signed by the patient’s daughter.¹¹³ The Supreme Court of Mississippi reasoned that because the patient lacked capacity to sign the nursing home agreement and because her daughter was in the statutory class of members that could act as a surrogate for her mother, the arbitration agreement was binding on the daughter as plaintiff in the wrongful death action.¹¹⁴ The Court did not reach its finding of patient incapacity pursuant to a declaration of incapacity by

108. *Id.* at 352-53; *see also* Owens v. Nat’l Health Corp., No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *5 (Tenn. Nov. 8, 2007) (defining health care decisions in TENN. CODE ANN. § 34-6-201(2) (2001) as “any care, treatment, service or procedure to maintain, diagnose or treat an individual’s physical or mental condition, and includes medical care. . .”).

109. *See infra* notes 113-121 and accompanying text.

110. *See infra* notes 114, 117-118 and accompanying text.

111. *See infra* notes 113-119 and accompanying text.

112. *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007).

113. *Id.* at 742.

114. *Id.* at 736-37. The relevant Mississippi surrogate statute reads in pertinent part:

(1) A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.

(2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient’s family who is reasonably available, in descending order of priority, may act as surrogate:

(a) The Spouse, unless legally separated;

(b) An adult child;

(c) A parent; or

(d) An adult brother or sister.

(7) A health-care decision made by a surrogate for a patient is effective without judicial approval.

MISS. CODE ANN. § 41-41-211 (West 2005).

the patient's primary physician, but rather relied on the hospital physician who reported that the patient "did not have the mental capacity to manage her affairs."¹¹⁵

The reasoning in *Brown* was recently upheld in *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, L.L.C.*¹¹⁶ when the United States District Court for the Northern District of Mississippi reached a similar conclusion that a finding of patient incapacity plus the signature of a daughter surrogate on the admissions contract were sufficient to enforce arbitration.¹¹⁷ In *Gulledge*, the court interpreted the decision in *Brown* to mean that "requiring an express admission of incapacity by a party" was not necessary to find incapacity.¹¹⁸ Thus, the fact that the admitting physician found the patient to be "confused" and diagnosed her with "advanced dementia," as well as nursing home reports of her condition, were sufficient to find incapacity.¹¹⁹

By contrast, the California Court of Appeal for the Fourth District held that surrogates lack authority to bind patients to arbitration provisions.¹²⁰ The court held that statutes authorizing the "next of kin" to make certain healthcare decisions for incompetent patients did not bind patients or signatories to arbitration provisions because the legislature granted authority to family members to make only health decisions, not arbitration decisions.¹²¹

v. Agent as Signor

Courts generally hold that absent actual or apparent authority from the patient, a signatory is not an agent of the patient and thus not bound

115. *Covenant Health Rehab of Picayune, L.P.*, 949 So. 2d at 736-37 (noting that the court made specific multiple references to the plaintiff's own admission of incapacity). Cf. *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, at *4 (Miss. Ct. App. Aug. 28, 2007) (holding that the signature of the patient's son on the admissions agreement was ineffective to bind the son when there was no finding of patient incapacity).

116. *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, LLC*, No. 3:07CV008-M-A, 2007 WL 3102141 (N.D. Miss. Oct. 22, 2007).

117. *Id.* at *2.

118. *Id.*

119. *Id.* at *2-3 (reporting that the plaintiff admitted that nursing home records showed that the patient was "unable to recall her date of birth, [the] current season, nor the three words that was [sic] given to her (pen, mill, apple), nor the fact that she is in the [nursing] facility").

120. *Flores v. Evergreen at San Diego, LLC*, 148 Cal. App. 4th 581, 590-91 (Cal. App. 4th Dist. 2007) (citing CAL. HEALTH & SAFETY CODE §§ 1418.8, subd. (c), 1599.3 (2007)).

121. *Id.* (noting that the court found the omission of authority to make arbitration decisions in the statutory language to be significant).

by terms of the arbitration agreement, even if the signatory is the patient's spouse.¹²²

For example, in *Sikes v. Heritage Oaks West Retirement Village*,¹²³ the wife of the patient signed admissions documents as "power of attorney/guardian" for her husband.¹²⁴ However, she had not been given power of attorney nor was she appointed as her husband's guardian.¹²⁵ Moreover, the patient was not incapacitated upon admission to the nursing home and displayed no affirmative actions to convey apparent authority to his wife to sign the admissions agreement.¹²⁶ Thus, the court determined that the arbitration agreement was invalid and unenforceable against the wife in her individual capacity.¹²⁷

In California, an arbitration clause was held non-binding in a nursing home contract that was signed by the daughters of a comatose patient.¹²⁸ The court found that the daughters had no authority to enter into an arbitration contract for their mother because they were not her agents.¹²⁹ The court specifically noted that, "[a] person cannot become the agent of another merely by representing herself as such," as the hospital claimed the daughters did by signing the agreement.¹³⁰ Instead, to be an agent, a person must be intentionally employed by the principal.¹³¹ The nursing home produced no evidence of the mother employing the daughters as her agents; consequently, the court denied the motion to compel arbitration.¹³²

Other courts reach similar conclusions when there is no evidence to suggest that the patient held the signatory out as his or her agent, took

122. See *infra* notes 124-39 and accompanying text.

123. *Sikes v. Heritage Oaks W. Ret. Vill.*, 238 S.W.3d 807 (Tex. App. 2007).

124. *Id.* at 810.

125. *Id.*

126. *Id.* at 809-10 (noting that the court found no evidence of the husband taking action to induce a belief that his wife was his agent).

127. *Id.* The nursing home argued that the wife was estopped from denying the validity of her signature. *Id.* at 810. However, the court rejected the argument, finding that estoppel is only valid when the plaintiff seeks to "derive a direct benefit from the contract containing the arbitration provision." *Id.* (quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005)). The court found the estoppel theory inapplicable because the wrongful death claim arose from common law remedies, and was not specific to the contract provisions. *Id.* at 809-10.

128. *Pagarigan v. Libby Care Ctr., Inc.*, 120 Cal. Rptr. 2d 892, 896 (Cal. Ct. App. 2002).

129. *Id.* at 894.

130. *Id.*

131. *Id.*

132. *Id.* at 896.

specific actions to induce a belief that the signatory possessed agency authority, or was even present when the agreement was signed.¹³³

Under a passive definition of apparent authority, however, the Supreme Court of Alabama recently held that a deceased patient's brother possessed apparent authority under agency theory, which justified binding him to the arbitration provision.¹³⁴ The brother signed the arbitration agreement as "authorized representative," and his sister granted him durable power of attorney several weeks after signing the admissions agreement.¹³⁵ The court used an apparent authority theory to find that the sister granted authority to her brother to execute the contract.¹³⁶

vi. Third-Party Beneficiaries

In wrongful death actions, courts are split as to whether third-party beneficiaries are bound by arbitration agreements, a significant issue in nursing home wrongful death claims.¹³⁷

In *Trinity Mission of Clinton, LLC v. Barber*,¹³⁸ a son brought a wrongful death action on behalf of himself and other beneficiaries of his deceased mother.¹³⁹ The Mississippi Court of Appeals held that, although the son's signature on the admissions documents was not binding because he acted as neither her agent nor her surrogate, the third-

133. See, e.g., *Sikes v. Heritage Oaks W. Ret. Vill.*, 238 S.W.3d 807, 809 (Tex. App. 2007) (finding the husband did not hold his wife out as his agent when she signed the admissions agreement); *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, at *3 (Miss. Ct. App. Aug. 28, 2007) (noting that it must be the principal that holds the agent out as having authority, not the agent himself and that the nursing home bears the burden of establishing the agency relationship); *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. App. Ct. 2007) (finding that the nursing home had not met its burden of showing that the patient had authorized her husband to act as her agent when he signed the admissions contract, particularly when her son did have power of attorney although he did not sign); *Texas Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345, 353-54 (Tex. App. 2007) (noting that what matters is the actions of the principal, not the agent, and that the principal was not even present when her daughter signed the admissions agreement).

134. *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27, 30-31 (Ala. 2007).

135. *Id.* at 28.

136. *Id.* at 30. Focusing less on the actions of the principal, the court found that apparent authority "is implied where the principal passively permits the agent to appear to a third person to have the authority to act on [her] behalf." *Id.* (quoting *Treadwell Ford, Inc. v. Courtesy Auto Brokers, Inc.*, 426 So.2d 859, 861 (Ala. Civ. App. 1983)). The admissions contract itself defined an "authorized representative" as "a person duly authorized by the Resident," and therefore the court was more willing to find that the brother signed with the patient's authority. *Id.* at 31.

137. See *infra* notes 139-149 and accompanying text.

138. *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720 (Miss. Ct. App. Aug. 28, 2007).

139. *Id.* at *1.

party beneficiaries were still bound by the arbitration provision.¹⁴⁰ To reach its conclusion, the court first reasoned that, because the patient clearly received benefit from the contract in the form of care, room, and board, she was bound by the agreement, even though she did not sign it.¹⁴¹ Second, the court found that if the patient was bound by the contract as a third-party beneficiary herself, her beneficiaries were bound as well because they “stand in her shoes” in a wrongful death action.¹⁴² Thus, the court concluded that the arbitration provision was binding on the third-party beneficiaries.¹⁴³

In addition, a provision in an arbitration agreement that specifically stated that “this [a]greement . . . shall not be revoked by the death of any Party hereto including the Resident. Said provisions shall be binding on the estate of the Resident,” was upheld in *Covenant Health Rehab of Picayune, L.P. v. Brown*.¹⁴⁴ The court relied on a previous holding to find that “arbitration agreements, specifically, are not invalidated by the death of the signatory and may be binding on successors and heirs if provided in the agreement.”¹⁴⁵ Interpreting the “estate of the Resident” to include heirs, the court determined that the beneficiaries were held to the arbitration provision.¹⁴⁶

However, recently a Texas court held that the plaintiff’s wife was not bound by an arbitration agreement in a wrongful death action when she specifically declined to sign the nursing home admissions contract in her individual capacity, although she signed it as the legal representative of the patient.¹⁴⁷ The court asserted that a wrongful death claim is personal to the statutory beneficiaries asserting the claims, and thus recovery did not benefit the estate of the former patient, but rather the wife in her individual capacity.¹⁴⁸ Consequently, the wife was not bound by the arbitration provision.¹⁴⁹

vii. Separate Signature on the Arbitration Agreement

In *Bedford Care Center-Monroe Hall, LLC v. Lewis*,¹⁵⁰ the court found that a conservator’s signature at the end of a nursing home

140. *Id.* at *5-6.

141. *Id.*

142. *Id.* at *6.

143. *Id.*

144. *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 738 (Miss. 2007) (plurality opinion).

145. *Id.* (citing *Cleveland v. Mann*, 942 So. 2d 108, 118 (Miss. 2006)).

146. *Covenant Health Rehab of Picayune, L.P.*, 949 So. 2d at 742.

147. *In re Kepka*, 178 S.W.3d 279, 294 (Tex. App. 2005).

148. *Id.*

149. *Id.*

150. *Bedford Care Ctr.-Monroe Hall, LLC v. Lewis*, 923 So. 2d 998 (Miss. 2006).

agreement did not bind the plaintiff conservator to arbitration in a negligence and gross negligence action against the nursing home of the patient.¹⁵¹ The court found that the conservator's failure to initial or sign next to the arbitration provision as requested was a manifestation of her intent not to be bound by its terms; however, the conservator did sign at the end of the document below text reading "the undersigned acknowledge that each of them has read and understood this agreement, including the arbitration provision and has received a copy of this agreement, and that each of them voluntarily consents to and accepts all of its terms."¹⁵² Despite signing at the end of the document, the court held that the conservator was not bound to the arbitration agreement due to her lack of signature by the arbitration provision itself.¹⁵³

2. Unconscionability

Prior to enforcing an arbitration provision, the court must also determine if the clause is unconscionable, and thus invalid.¹⁵⁴ Unconscionability is determined at the time of making the agreement and is marked by unfair terms that are oppressive to a disadvantaged party, taking into account the setting, purpose and effect of the particular agreement.¹⁵⁵ Generally, to be unconscionable, the arbitration agreement must be both procedurally and substantively unconscionable.¹⁵⁶

Alternatively, some jurisdictions use a sliding scale test to find unconscionability in the aggregate.¹⁵⁷ For example, in *Romano v. Manor Care, Inc.*,¹⁵⁸ the court found that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and

151. *Id.* at 1002.

152. *Id.* at 1000-01.

153. *Id.*

154. *See supra* note 41 and accompanying text.

155. *Miller v. Cotter*, 863 N.E.2d 537, 545 (Mass. 2007).

156. *See Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, at *7 (Miss. Ct. App. Aug. 28, 2007). The court defined unconscionability as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *Id.* (citing *Entergy Miss., Inc. v. Burdett Gin Co.*, 726 So. 2d 1202, 1207 para.11 (Miss. 1998)); *see also Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 579 (Fla. Dist. Ct. App. 2007) (per curium).

157. *See, e.g., Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003) (finding an arbitration provision unconscionable "[b]ecause the arbitration contract in this case is substantively unconscionable to a great degree, and we conclude that there is some irregularity in the contract formation amounting to procedural unconscionability of some degree. . . .").

158. *Id.*

vice versa.”¹⁵⁹ The party bringing the affirmative defense of unconscionability bears the burden of proof.¹⁶⁰

i. Procedural Unconscionability

Procedural unconscionability focuses on the circumstances surrounding formation of the contract and is defined as an absence of meaningful choice by one of the parties.¹⁶¹ Factors the court uses to determine procedural unconscionability include lack of knowledge of the arbitration provisions, lack of voluntariness, inconspicuous print, complex language, disparity in bargaining power, lack of opportunity to review the contract or ask questions about its terms, offering the contract on a “take it or leave it” basis, unreasonable terms using an ordinary person standard, and the nature of the health care services.¹⁶²

The Tennessee Supreme Court recently concluded that the arbitration agreement at issue between a patient and doctor was not procedurally unconscionable because it was a stand-alone contract, had an attached explanation of its purpose that encouraged the patient to ask questions, contained “ten-point capital letter red type, directly above the signature line, that [read] ‘by signing this contract you are giving up your right to a jury or court trial’ on any medical malpractice claim,” and provided for revocation by the patient within thirty days.¹⁶³

Other courts have come to a similar conclusion. The Mississippi Supreme Court found an arbitration clause was not procedurally unconscionable when it was on the last page of a six-page agreement, was clearly marked in bold-faced type and capital letters, and was designed to draw attention to text indicating that signing the agreement was voluntary.¹⁶⁴ Although the court found the agreement to be a contract of adhesion (since the patient and his signatory daughter were a weaker party with little choice in the matter), it did not find evidence of procedural unconscionability given that the plaintiffs were “two competent individuals signing a well-marked, highly visible agreement

159. *Id.* at 62.

160. *Carraway v. Beverly Enters. Alabama, Inc.*, 978 So. 2d 27, 31-32 (Ala. 2007).

161. *See, e.g., Romano*, 861 So. 2d at 62; *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 517 (Miss. 2005).

162. *See Buraczynski v. Eyring*, 919 S.W.2d 314, 320-21 (Tenn. 1996); *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, at *7 (Miss. Ct. App. Aug. 28, 2007); *see also Gainsville Health Care Ctr. v. Weston*, 857 So. 2d 278 (Fla. Dist. Ct. App. 2003).

163. *Buraczynski*, 919 S.W.2d at 321.

164. *Vicksburg Partners, L.P.*, 911 So. 2d at 520.

which indicated very clearly that dispute resolution would be accomplished by way of arbitration.”¹⁶⁵

The Massachusetts Supreme Court came to a similar conclusion when it held that an arbitration agreement executed by an adult son on behalf of his father was not procedurally unconscionable when the son was an intelligent man who had executed similar agreements in the past, was given thirty days to rescind the arbitration provision, the arbitration agreement appeared on a separate form, and acceptance of the agreement was not a condition of admission.¹⁶⁶

Finally, the Supreme Court of Alabama did not find unconscionability when the arbitration agreement conspicuously read, “NOT A CONDITION OF ADMISSION—READ CAREFULLY,” advised the resident to seek legal counsel, was not a condition for admission, and stated that the agreement “may be rescinded by written notice to the Facility from the Resident within thirty days of signature.”¹⁶⁷

Reaching a contrary result, a Tennessee circuit court refused to enforce arbitration based on procedural unconscionability when a husband signed an agreement on behalf of his wife.¹⁶⁸ The court invalidated the arbitration provision after finding that the husband was illiterate, the admissions contract was presented on a “take it or leave it” basis without adequate explanation of the arbitration provision, the provision was buried on the tenth page of an eleven-page document, and the wife was in great need of medical care.¹⁶⁹

Also, on remand, the Fifth Circuit Court of Appeals reversed summary judgment for the plaintiff in a wrongful death claim based on whether the arbitration agreement was procedurally unconscionable.¹⁷⁰ The court determined that material facts existed as to whether an

165. *Id.* at 520; *see also* *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 737 (Miss. 2007) (reaching the same conclusion with identical contract headings and length).

166. *Miller v. Cotter*, 863 N.E.2d 537, 545 (Mass. 2007).

167. *Carraway v. Beverly Enterprises Alabama, Inc.*, 978 So. 2d 27, 29, 32 (Ala. 2007). Alabama’s test for unconscionability does not specifically break out procedural and substantive unconscionability, but rather it determines “whether there are (1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power.” *Id.* at 32. The particular factors reviewed by the court, however, fit in the procedural unconscionability category applied by other courts. *See supra* note 162 and accompanying text.

168. *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 732 (Tenn. Ct. App. 2003).

169. *Id.* at 734-35.

170. *Beverly Enters.-Miss. Inc. v. Powell*, 244 F. App’x 577, 579 (5th Cir. 2007) (noting that federal decisions regarding nursing home issues are rare, but will likely increase in the future).

illiterate man received proper explanation of the arbitration agreement and whether he signed the agreement with an “X”.¹⁷¹

ii. Substantive Unconscionability

Substantive unconscionability is defined as contract terms that are unreasonably favorable to one of the parties.¹⁷² The court decides substantive unconscionability by looking at specific terms of the agreement that may represent oppression or gross disparity between the parties.¹⁷³ A term which significantly alters the legal rights or remedies available to one of the parties may be per se unconscionable.¹⁷⁴

If substantive unconscionability is found, the court will first attempt to strike the unconscionable term(s) and uphold the remainder of the arbitration agreement.¹⁷⁵ If, however, the unconscionable term is so intertwined with the arbitration agreement that it cannot be severed, a court may invalidate the entire arbitration agreement.¹⁷⁶

In *Trinity Mission of Clinton, LLC v. Barber*, the court found the following terms in the arbitration agreement unconscionable: (1) allowing the nursing home to sue in court for disputes regarding payment but requiring disputes on any other grounds to be arbitrated; (2) limiting damages; (3) waiving punitive damages; and (4) charging a fee of three dollars per page when requesting medical records, which was higher than the statutorily-determined amount.¹⁷⁷ The mandatory arbitration provision, the main issue on appeal, however, was upheld.¹⁷⁸

171. *Id.* (discussing that one of the main issues in the dispute was whether the “X” was the decedent’s signature and that the only witnesses to the signature were nursing home employees).

172. *See, e.g.,* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003); *Powertel v. Bexley*, 743 So. 2d 570, 574-76 (Fla. Dist. Ct. App. 1999); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 657-58 (S.D. Miss. 2000).

173. *See* *E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2002); *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 737 (Miss. 2007) (analyzing provisions for substantive unconscionability by looking at the four corners of the agreement).

174. *Covenant Health Rehab of Picayune, L.P.*, 949 So. 2d at 737.

175. *See* *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773, 775 (Fla. Dist. Ct. App. 2007); *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, at *9 (Miss. Ct. App. Aug. 28, 2007) (citing *Covenant Health Rehab of Picayune, L.P.*, 949 So. 2d 732 at 741).

176. *See* *Place at Vero Beach, Inc.*, 953 So. 2d at 775-76 (stating that offending sentences cannot be severed if they are interdependent with the remaining clauses and would cause the court to rewrite the agreement).

177. *Trinity Mission of Clinton, LLC*, 2007 WL 2421720, at *10-11.

178. *Id.* The court relied on the holding in *Covenant Health Rehab of Picayune, L.P. v. Brown* since the identical provision was upheld in that case. *Id.* The provision read in pertinent part:

Instead of invalidating the entire arbitration agreement, the court severed the unconscionable portions and held the remainder of the agreement valid.¹⁷⁹

Likewise, in *Covenant Health Rehab of Picayune, L.P. v. Brown*, the court severed substantively unconscionable provisions and upheld the remainder of the arbitration agreement.¹⁸⁰ The court struck provisions that limited liability,¹⁸¹ waived punitive damages,¹⁸² forfeited all claims except for those involving willful acts,¹⁸³ allowed the nursing facility to bring suit on issues of payment but prohibited the resident from suing on all grounds,¹⁸⁴ required the party challenging the enforceability of the arbitration agreement or award to pay all costs,¹⁸⁵ and imposed a one-year time limit on legal action.¹⁸⁶

An example of another arbitration clause that a court completely invalidated because of substantive unconscionability is one that granted a unilateral right for the nursing home to reject the decision of an arbitrator

The Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them, and the Facility . . . shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures. . . . All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursuing a timely resolution of a claim, dispute or controversy, should one arise. The Parties agree to share equally the costs of such arbitration regardless of the outcome. Consistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7.

Covenant Health Rehab of Picayune, L.P., 949 So. 2d at 740. The court struck the last sentence of the provision relating to damages but upheld the arbitration agreement as modified. *Id.* at 741.

179. *Trinity Mission of Clinton, LLC*, 2007 WL 2421720, at *11 (upholding the arbitration agreement after severing the last sentence of the mandatory arbitration provision and all other unconscionable terms).

180. *Covenant Health Rehab of Picayune, L.P.*, 949 So. 2d at 741-42.

181. *Id.* at 739 (quoting Section E7 limiting damages as: "Should any claim, dispute or controversy arise between the Parties . . . the settlement thereof shall be for actual damages not exceed the lesser of a) \$50,000 or b) the number of days that the Resident was in the Facility multiplied times the daily rate applicable for said Resident. . . .").

182. *Id.* (listing Section C8: "The Parties hereto agree to waive punitive damages against each other and agree not to seek punitive damages under any circumstances.").

183. *Id.* (stating Section C5 as: "The Resident and Responsible Party further agree to indemnify and hold harmless the Facility from and against claims . . . unless such claim . . . is the result of the Facility's willful conduct.").

184. *Id.* (quoting Section E5 as: "In the event a claim . . . shall arise between the Parties other than regarding matters concerning the payment for services rendered or refunds due, the Parties agree to participate in a grievance resolution process.").

185. *Id.* (stating Section E12: "In the event a Party fails to proceed with mediation and/or arbitration, challenges to the arbitrator's award . . . the other Party is entitled to all costs of suit or action including reasonable attorney fees. . . .").

186. *Id.* Section E16 of the arbitration agreement prohibited legal action "more than one year following the happening of the event giving rise to [the] complaint." *Id.* The court held that the facility could not alter the statute of limitations. *Id.* at 740.

without cause, required a second arbitration before a panel of three physicians, and required the patient to pay one-half the costs of both arbitrations.¹⁸⁷

3. Void as Against Public Policy

The court may invalidate an otherwise valid contract if “its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations.”¹⁸⁸ Courts have generally rejected the argument that an arbitration agreement in a nursing home contract is *per se* void as against public policy, often citing that arbitration does not take away any rights the parties may have, but simply represents an agreement to move the dispute to a different forum.¹⁸⁹

However, Florida courts provide an example of when an arbitration agreement is void as against public policy.¹⁹⁰ The nursing home contract in *Blankfeld v. Richmond Health Care, Inc.* required that disputes be resolved by arbitration before the National Health Lawyers Association (“NHLA”).¹⁹¹ The rules of the NHLA state that the arbitrator may not award damages absent a showing of clear and convincing evidence that the alleged offending party is guilty of the misconduct.¹⁹² The court ruled that the clear and convincing evidence standard was contrary to Florida’s Nursing Home Rights Act (“NHRA”), § 400.023(2)(a)-(d) (2001), which required a preponderance of the evidence burden of proof.¹⁹³ In addition, the court found that § 400.023(1) of the NHRA was a remedial statute that allowed for an action to be brought “in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any violation of the rights of a resident or for negligence.”¹⁹⁴ Because the rules of the NHLA effectively limited, if not

187. *Beynon v. Garden Grove Med. Group*, 161 Cal. Rptr. 146, 150 (Cal. Ct. App. 1980).

188. *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 578 (Fla. Dist. Ct. App. 2007) (per curiam).

189. *See Gullede v. Trinity Mission Health & Rehab of Holly Springs, LLC*, No. 3:07CV008-M-A, 2007 WL 3102141, at *5 (N.D. Miss. Oct. 22, 2007); *Owens v. Nat’l Health Corp.*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *8 (Tenn. Nov. 8, 2007) (citing *Buraczynski v. Eyring*, 919 S.W.2d 314, 321 (Tenn. 1996)).

190. *See Fletcher v. Huntington Place L.P.*, 952 So. 2d 1225, 1227 (Fla. Dist. Ct. App. 2007); *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773, 775-76 (Fla. Dist. Ct. App. 2007); *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 2006); *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 299 (Fla. Dist. Ct. App. 2005).

191. *Blankfeld*, 902 So. 2d at 297.

192. *Id.* at 298.

193. *Id.*

194. *Id.*

eliminated, some of the remedies provided by the statute, the court held the arbitration clause void as against public policy.¹⁹⁵

The same court invalidated a similar arbitration agreement two years later in *Place at Vero Beach, Inc. v. Hanson*.¹⁹⁶ Likewise, the Florida Fifth District Court of Appeal concluded that an arbitration agreement that required clear and convincing evidence of intentional misconduct in order to recover certain kinds of damages “substantially limited the patient’s remedies under the Nursing Home Resident’s Act,” and was void as against public policy.¹⁹⁷

Similar to unconscionable provisions, provisions that violate public policy may be severed from the agreement and the remainder of the agreement enforced.¹⁹⁸ Thus, in *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*,¹⁹⁹ while the clause that capped non-economic damages at \$250,000 and completely waived all punitive damages was declared void as against public policy, the remainder of the arbitration agreement was upheld.²⁰⁰

4. “Other Consideration” Argument

Some plaintiffs have argued that an arbitration clause in a nursing home agreement is not binding because it violates federal Medicare and/or Medicaid law, which prohibits additional fees or “other

195. *Id.*

196. *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773, 775-76 (Fla. Dist. Ct. App. 2007). The arbitration agreement specified that disputes would be arbitrated by the American Health Lawyers Association (AHLA), which required a clear and convincing evidence standard, while Florida’s NHRA requires a more favorable standard of proof for the plaintiff—preponderance of the evidence. *Id.* at 774. The court rejected the nursing home’s argument that by specifying that the agreement shall be governed by the “laws of Florida,” the parties agreed that AHLA rules were superseded by Florida law; the court found no evidence of such an agreement. *Id.* at 775. Because the arbitration agreement was in conflict with Florida state law and the agreement was “built around” the AHLA provision, the offending provision could not be severed and the entire agreement was unenforceable. *Id.* at 775-76.

197. *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242, 1242-43 (Fla. Dist. Ct. App. 2006); *see also Fletcher v. Huntington Place L.P.*, 952 So. 2d 1225, 1226-27 (Fla. Dist. Ct. App. 2007) (relying on the ruling in *SA-PG-Ocala, LLC v. Stokes* to reach a similar holding).

198. *See supra* notes 175-179 and accompanying text.

199. *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574 (Fla. Dist. Ct. App. 2007) (per curiam).

200. *Id.* at 578-79. The pertinent provisions read, “[n]oneconomic damages, such as pain and suffering, shall be limited to a maximum of \$250,000” and “[p]unitive damages shall not be awarded.” *Id.* at 580 (Barfield & Padovano, JJ., concurring). In the case, the estate of an elderly female patient with advanced Alzheimer’s brought suit alleging negligence and other statutory violations when she died after being beaten and raped at the nursing facility. *Id.* at 576.

consideration” as a precondition of admitting a person to a nursing home facility.²⁰¹

Courts that have faced this argument have found that an agreement to arbitrate is not “other consideration” as contemplated by 42 U.S.C. § 1396r(c)(5)(A)(iii), which refers only to consideration similar to gifts or money.²⁰² In reaching its conclusion, one court found that the arbitration agreement simply sets a forum for future disputes and that, if the court agreed with the argument, “virtually any contract term” a plaintiff decided he or she did not like could be construed as “other consideration.”²⁰³

While an arbitration agreement is not “other consideration” in violation of the federal statute, the agreement represents sufficient consideration under contract principles to form a binding contract.²⁰⁴ The Supreme Judicial Court of Massachusetts found that a “reciprocal exchange of benefit and detriment,” in that each party “waived its right to judicial process and gained the right to invoke arbitration,” was adequate consideration to form a binding contract.²⁰⁵

5. Contract of Adhesion

Courts have routinely held that contracts of adhesion made on a “take-it or leave-it” basis are not per se unconscionable.²⁰⁶ More than

201. “[A] nursing facility must . . . not charge solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan . . . , any gift, money, donation, or *other consideration* as a precondition of admitting . . . the individual to the facility. . . .” 42 U.S.C. § 1396r(c)(5)(A)(iii) (2007) (emphasis added).

See, e.g., Owens v. Nat’l Health Corp., No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *8-9 (Tenn. Nov. 8, 2007) (citing 42 U.S.C. § 1396r(c)(5)(A)(iii) (2005), as applied to nursing facilities, and 42 C.F.R. § 483.12(d)(3) (2005), as applied to a person eligible for Medicaid); *see also* Hopkins, *supra* note 42, at 40.

202. *See, e.g.,* Gullede v. Trinity Mission Health & Rehab of Holly Springs, LLC, No. 3:07CV008-M-A, 2007 WL 3102141, at *4 (N.D. Miss. Oct. 22, 2007); Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983, 989 (Ala. 2004); Gainsville Health Care Ctr., Inc. v. Weston, 857 So. 2d 278, 288 (Fla. Dist. Ct. App. 2003); Broughsville v. OHECC, LLC, No. 05CA008672, 2005 WL 3483777, at *7-8 (Ohio Ct. App. Dec. 21, 2005); Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 418-19 (Ind. Ct. App. 2004).

203. *Owens*, 890 So. 2d at 989.

204. *Miller v. Cotter*, 863 N.E.2d 537, 547 n.16 (Mass. 2007).

205. *Id.*

206. *See, e.g.,* Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So. 2d 732, 737 (Miss. 2007) (“There is nothing per se unconscionable about arbitration agreements.” (quoting *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 518 (Miss. 2005))); *Gullede*, 2007 WL 3102141, at *3 (“[A] contract of adhesion . . . only become[s] procedurally unconscionable where the stronger party’s terms are unnegotiable and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.”

adhesion, such as unconscionability or offending public policy, must be present to invalidate a contract.²⁰⁷

In conclusion, determining the enforceability of arbitration agreements in nursing home admissions contracts is complex. Multiple issues such as the applicability of state or federal law, the authority of the person signing the admissions agreement, and the potential procedural, and substantive unconscionability of the arbitration provisions combine to make consistent court holdings difficult. As a result, patients, families, and nursing homes lack the clarity necessary to knowingly enter into arbitration agreements.

IV. ANALYSIS: CLARIFYING ARBITRATION AGREEMENTS IN ADMISSIONS CONTRACTS

Arbitrating wrongful death claims in the nursing home setting is a hot-button issue winding its way through the state and, most recently, the federal court systems.²⁰⁸ The nursing home industry, courts, and legislatures must work together to bring necessary clarity.

First, this article briefly discusses the court's willingness to apply state law instead of the FAA, in light of the court's history of near carte blanche approval of arbitration agreements.²⁰⁹ Second, it argues that the artificiality of the signature on the nursing home admissions contract is rife with confusion and that it must be clarified for resident and nursing home alike.²¹⁰ Current conflicting holdings stand in the way of precedence in nursing home jurisprudence. Third, the article suggests that, although court opinions vary, recent holdings of unconscionability in nursing home arbitration agreements provide sufficient guidance for nursing homes to adjust their admissions contracts and procedures to avoid unconscionable terms.²¹¹ Fourth, in addition to unconscionability, the article analyzes the validity of other arguments against enforcement such as void as against public policy, other consideration, and waiver.²¹²

(quoting *Vicksburg Partners, L.P.*, 911 So. 2d at 518) (internal quotation marks omitted)).

207. See *Miller*, 863 N.E.2d at 547 n.16 (“[C]ontracts [of adhesion] are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances.” (second alteration in original) (quoting *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705, 708 (Mass. App. Ct. 1992))); see also *supra* note 165 and accompanying text.

208. See *supra* notes 8-10, 31-39 and accompanying text (noting the increase of litigation involving mandatory arbitration agreements in nursing home wrongful death actions since 2005 and the various cases in state and federal courts, most in 2007).

209. See *infra* notes 213-233 and accompanying text.

210. See *infra* notes 238-281 and accompanying text.

211. See *infra* notes 283-311 and accompanying text.

212. See *infra* notes 305-316 and accompanying text.

Finally, the article recommends change. It proposes drawing the line at excluding wrongful death claims from arbitration agreements, or, at the very least, modifying arbitration provisions and procedures in a meaningful way.

A. *Applicable Law*

What once was a perfunctory finding that the FAA governed the interpretation of arbitration agreements appears to be challenged in current nursing home arbitration cases.²¹³ Several cracks in the analysis of whether the FAA applies deserve the court's attention. If the FAA does not apply, courts are significantly more empowered to invalidate arbitration agreements under state, federal, or common law principles.²¹⁴

For the FAA to apply, the contract in question must "involve interstate commerce."²¹⁵ Mississippi has perhaps the most experience of any jurisdiction in interpreting nursing home arbitration agreements.²¹⁶ In *Vicksburg Partners*, the Supreme Court of Mississippi set a clear precedent, finding that nursing home arbitration agreements do involve interstate commerce, primarily because of the patient's use of Medicare funds to cover the costs of care.²¹⁷

Notwithstanding the holding in *Vicksburg Partners*, some recent court opinions suggest that the FAA may not apply.²¹⁸ First, the Supreme Court of Oklahoma has specifically rejected Mississippi's reasoning that such agreements "involve interstate commerce" when they are applied to a purely local transaction.²¹⁹ Instead, the court found that Congress provides Medicaid financial assistance to states that comply with federal regulations and, as such, Congress is exercising its spending power and not its commerce power.²²⁰ This distinction re-characterizes the source of power to more accurately reflect the purpose of the programs previously relied upon to find involvement in interstate

213. See *supra* notes 16-30 and accompanying text (illustrating the favorable history towards arbitration); *supra* notes 51-70 and accompanying text (summarizing three cases that have applied state law to the agreement).

214. See *supra* notes 49-70 and accompanying text.

215. See *supra* notes 23-24 and accompanying text.

216. See case cited *supra* note 48 and accompanying text (referring to *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005)).

217. See case cited *supra* note 48 and accompanying text (highlighting that the Mississippi cases serve as representative examples of similar findings).

218. See cases cited *supra* notes 50-70 and accompanying text (citing *Bruner v. Timberlane Manor, L.P.*, 155 P.3d 16 (Okla. 2006); *In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005); *Miller v. Cotter*, 863 N.E.2d 537 (Mass 2007); and *Owens v. Nat'l Health Corp.*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669 (Tenn. Nov. 8, 2007)).

219. See case cited *supra* notes 51-58 and accompanying text (summarizing the *Bruner* decision).

220. See case cited *supra* note 53 and accompanying text.

commerce.²²¹ In turn, the various regulations imposed on states who want to receive Medicaid funding are under the umbrella of “health and safety” regulations of the SSA, which are silent as to a connection of the various programs to interstate commerce.²²² Given the holding in *Bruner*, a determination of whether a nursing home arbitration agreement involves interstate commerce is at least up to more debate than previously given by the courts.²²³

Second, even if nursing home arbitration agreements affect interstate commerce in the aggregate, the FAA may still be preempted by conflicting federal law.²²⁴ For example, the federal Social Security Act governs regulations of state Medicaid programs.²²⁵ The SSA specifically conveys a right of judicial review, as permitted by state law.²²⁶ Therefore, a federal regulation may preclude the applicability of the FAA if the federal regulation permits state law to legislate judicial review, as held in *Bruner*.²²⁷

The principle that a conflicting federal law may preempt the FAA is also illustrated in *In re Kepka*.²²⁸ The federal McCarran-Ferguson Act allows states to regulate the business of insurance and was found by the court to apply to healthcare contracts aimed at protecting the relationship between the insurer and the insured as required under the Act.²²⁹ Because the MFA preempted the FAA, the state statute regulating notice requirements of arbitration agreements was enforceable.²³⁰ Both examples, at the very least, illustrate a split of court opinion as to the applicability, in the presence of conflicting federal law, of the FAA to terms of certain nursing home arbitration agreements.

Third, even assuming the FAA applies, the FAA does not preclude application of state law or terms of the parties that further the scope of arbitration.²³¹ For example, the Supreme Judicial Court of Massachusetts

221. See case cited *supra* notes 48, 53 and accompanying text (highlighting a shift in reasoning).

222. See case cited *supra* note 53 and accompanying text.

223. See case cited *supra* notes 50-54 and accompanying text.

224. See case cited *supra* note 56 and accompanying text (noting the court’s reasoning for determining that the FAA did not apply).

225. See case cited *supra* note 51 and accompanying text.

226. See case cited *supra* notes 53-56 and accompanying text.

227. See case cited *supra* notes 51-58 and accompanying text.

228. See case cited *supra* notes 60-62 and accompanying text (citing *In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005); *Miller v. Cotter*, 863 N.E.2d 537 (Mass 2007)).

229. See *supra* note 61 and accompanying text (noting that the court characterized the nursing home contract as involving medical insurance).

230. See *supra* note 62 and accompanying text.

231. See cases cited *supra* notes 28-29, 67 and accompanying text (noting the findings of the Supreme Court that did not preclude states from broadening the scope of the FAA).

held that the Massachusetts Arbitration Act applied to the party's arbitration agreement.²³² Although the court noted that the FAA applied as well, it found that Congress never intended the FAA to preempt all state arbitration law.²³³ Likewise, the Tennessee Supreme Court upheld Tennessee as the choice of law in a nursing home agreement, rather than holding that the FAA applied.²³⁴

While it is too early to determine if other courts will follow the reasoning in the four cases mentioned above, the decisions highlight the fact that controversy exists as to the applicable law when interpreting arbitration agreements. Consequently, in order to inform future decisions, greater emphasis should be placed in court opinion on the reasons why the FAA, other federal law, or state law applies.

B. *Validity of Arbitration Agreement Issues*

Several obstacles exist for determining the validity of an arbitration agreement in a nursing home admissions contract.²³⁵ The three biggest areas of confusion among the courts are the authority of the signatory, procedural unconscionability, and substantive unconscionability.²³⁶

1. Signature Issues

Signature problems plague both plaintiffs and nursing homes alike.²³⁷ Courts are significantly divided as to which signors have authority to bind a party to arbitration in a wrongful death claim.²³⁸ The current titles for signatories run the gamut from "authorized representative," "personal representative," "responsible party," or other label.²³⁹ However, the title on the signature is largely artificial considering what seems to matter most to the courts is whether the patient lacks capacity to sign or authorize another to sign and whether the signor actually possesses the requisite authority.²⁴⁰

232. See cases cited *supra* note 63 and accompanying text.

233. See cases cited *supra* notes 28-29, 63 and accompanying text.

234. See *supra* notes 65-67 and accompanying text (highlighting the decision in *Owens*).

235. See *supra* notes 71-207 and accompanying text.

236. See *supra* notes 71-187 and accompanying text.

237. See *supra* notes 71-152 and accompanying text.

238. See *supra* notes 76-152 and accompanying text (summarizing difficulties in interpretation of signors in various capacities).

239. See *supra* notes 71-152 and accompanying text.

240. See cases cited *supra* notes 92-95, 123-127 and accompanying text (illustrating *Noland Health Servs, Inc. v. Wright*, 971 So. 2d 681 (Ala. 2007) and *Sikes v. Heritage Oaks W. Ret. Vill.*, 238 S.W.3d 807 (Tex. App. 2007), in which the plaintiff signed as "personal representative" or other title, but lacked legal authority to bind the patient to an arbitration agreement).

i. Attorney-in-Fact

Generally, a signor who possesses durable power of attorney has authority to bind the patient to an arbitration agreement; however, courts have held otherwise in certain situations.²⁴¹ *Miller* represents the majority opinion that an individual with durable power of attorney has authority to enter into contracts on behalf of the patient, and thus can bind the patient to an arbitration agreement.²⁴²

However, two grounds exist for questioning the authority of a durable power of attorney. First, under many durable powers of attorney, the patient must be deemed by the court to be incompetent for the authority to be conveyed.²⁴³ Frequently, an official determination of capacity has not been made before invoking the power of attorney, and questions of capacity are not easily resolved by the court.²⁴⁴

Second, the specific language of the durable power of attorney may reference the ability to make “health care decisions” as opposed to general contract authority.²⁴⁵ This concern is also evident when the person signing the agreement is a health care proxy, medical power of attorney, or other statutory surrogate.²⁴⁶ Whether a predispute mandatory arbitration agreement is a “health care” decision is still up for debate in the court system.²⁴⁷ Recently, the Tennessee Supreme Court upheld the lower court’s decision in *Owens* to find that a nursing home contract was a “health care” decision and under the purview of a durable power of

241. See *supra* note 76-83 and accompanying text (summarizing case law interpreting the authority of a durable power of attorney).

242. See *supra* notes 82-83 and accompanying text.

243. See cases cited *supra* notes 105-106 and accompanying text (noting that a durable medical power of attorney requires a finding of incapacity); see also *supra* notes 82-83 and accompanying text (suggesting that because the father was deemed to be incapacitated, the durable power of attorney held by the son was given more effect).

244. See cases cited *supra* notes 115, 117-119 and accompanying text (demonstrating the view that express incapacity need not be found, but that the report of the physician admitting the patient to the nursing home may be sufficient); see also *infra* notes 258-260 and accompanying text.

245. See *supra* notes 77-78 and accompanying text (recounting one of the central issues in *Owens* as whether the authority of the attorney-in-fact applied to health care decisions).

246. See cases cited *supra* notes 98-108 and accompanying text (listing the central question for a proxy as whether an arbitration agreement constitutes a health care decision); see also *supra* notes 120-121 and accompanying text (summarizing the *Flores* decision which held that decisions to arbitrate were not health care decisions under the surrogate statute).

247. See cases cited *supra* notes 78, 98-108 and accompanying text (showing the different conclusions of various courts regarding whether an arbitration agreement constitutes a health care decision).

attorney.²⁴⁸ However, the court reached its conclusion by asserting that “the decision to admit [the patient] to a nursing home clearly constitutes a health care decision.”²⁴⁹ While a decision to admit a patient to the nursing home is likely a health care decision, a decision to bind the patient to arbitration of disputes is beyond the scope of a health care decision.²⁵⁰ In California, Florida, and Texas, courts have narrowly interpreted the meaning of health care decisions to those relating to life-prolonging procedures or consent to treatment.²⁵¹

ii. Personal Representative

The term “personal representative” lacks definition, and even if the non-patient signs as a personal representative, he or she does not actually possess legal authority to bind the patient.²⁵² The court in *Noland Health Services, Inc.* noted that even though the daughter-in-law admitting the patient signed as the “personal representative,” she never possessed a power of attorney, and thus the arbitration agreement was not binding.²⁵³ On the other hand, in *MN MedInvest Co., L.P.*, the court found that an arbitration agreement was binding on a child where the parent signed as “personal representative.”²⁵⁴ The court found authority from the doctrine of necessities, not from a legal definition of a “personal representative.”²⁵⁵

iii. Surrogate

Statutory or surrogate authority of the next of kin when signing an arbitration agreement highlights another split of court opinion regarding signors with authority.²⁵⁶ First, the patient must be deemed incompetent; second, the signor must be in the statutory class of people granted

248. See case cited *supra* notes 77-78 and accompanying text (citing *Owens v. Nat'l Health Corp.*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669 (Tenn. Nov. 8, 2007)).

249. See case cited *supra* note 78 and accompanying text.

250. See cases cited *supra* notes 98-108 and accompanying text (discussing *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. Dist. Ct. App. 2005) and *Texas Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345 (Tex. App. 2007)).

251. See cases cited *supra* notes 98-108, 120-121 and accompanying text (representing a narrow interpretation of health care decisions in the context of whether a health care proxy or medical power of attorney has requisite authority to bind).

252. See *supra* notes 94-95 and accompanying text.

253. See *supra* note 95 and accompanying text (suggesting also that because the signor was a daughter-in-law, the court was less persuaded to find her signature binding).

254. See *supra* notes 87-90 and accompanying text.

255. See *supra* note 89 and accompanying text (noting that even though the arbitration clause was upheld under the necessities doctrine, the facts of the case represent the lack of definition in the term “personal representative”).

256. See *supra* notes 113-121 and accompanying text (summarizing cases involving surrogate authority).

authority, such as a spouse or child.²⁵⁷ A finding of incapacity is the most difficult of the issues for the court, particularly because oftentimes there has never been a determination of capacity by medical personnel.²⁵⁸ To handle this lack of determination, the Supreme Court of Mississippi found that incapacity could be inferred from other records, such as the report of the admitting physician.²⁵⁹

On the other hand, if a statute requires specific certification of incapacity, as in *Texas Cityview Care Center, L.P.*, the court may refuse to find incapacity absent such certification or express finding.²⁶⁰ The crux of the problem is that the law presumes competency while the nursing home admissions process presumes incompetency by virtue of the fact that often the patient is not involved in the admissions process at all.²⁶¹ Without patient participation in the nursing home admission process, the nursing home, in effect, makes an unofficial determination of incapacity while the court refuses to find incapacity without an official determination and therefore rejects the authority of the signor.

iv. Agent

Perhaps the most troublesome area of court interpretation regarding signors is the use of agency theory to bind signors. Most courts have rejected apparent authority theories to bind signors, including as applied to spouses.²⁶² Court reasoning focuses on the actions of the principal that evidence a grant of authority to the signor, as in *Pagarigan v. Libby Care Center, Inc.* and a host of other cases.²⁶³

However, patients are generally in no position to grant authority to anyone, which is the very reason they are seeking care.²⁶⁴ Consequently, the Supreme Court of Alabama has adopted a more passive approach to

257. See cases cited *supra* notes 114, 117 and accompanying text (highlighting court analysis requiring a finding of incapacity and a signature by a family member).

258. See cases cited *supra* notes 115, 118-119 and accompanying text (suggesting that patients often do not have express determinations of incapacity from their primary physician, but incapacity is often present as evidenced by the surrounding circumstances).

259. See cases cited *supra* notes 115, 118-119 and accompanying text.

260. See *supra* notes 104-105 and accompanying text (finding no certification of incompetence, the court refused to find that the daughter had authority to bind the patient to an arbitration agreement).

261. See *supra* notes 115, 118-119 and accompanying text.

262. See *supra* notes 124-133 and accompanying text (summarizing cases where apparent authority arguments were rejected).

263. See *supra* notes 130-133 and accompanying text (illustrating that becoming an agent requires more than the agent merely representing himself as such, but rather requires a specific action by the principal).

264. See *supra* notes 115, 118-119 and accompanying text (highlighting that many patients are not physically or mentally able to participate in the admissions process).

determining apparent authority.²⁶⁵ Instead of focusing on the actions of the principal, the Court held that apparent authority could be implied if the principal “passively permits” the agent to appear to have authority.²⁶⁶ Because many patients are neither present during the admissions process nor have the mental acumen to give either active or passive authority to another, agency theory must be further explored by the courts as it relates to signing nursing home admissions documents.²⁶⁷

v. Third-Party Beneficiary

Finally, a significant concern regarding the binding nature of arbitration agreements in wrongful death actions against nursing homes is whether they are binding on third-party beneficiaries.²⁶⁸ This issue is unique to wrongful death actions because the patient is no longer alive to bring the action.²⁶⁹ Once again, courts are divided. *Trinity Mission of Clinton, LLC*, represents a significant decision of which all plaintiffs’ lawyers should take notice.²⁷⁰ The patient did not sign the arbitration agreement, and the court found that the son who admitted his mother held no authority to bind the patient to arbitration.²⁷¹ Nevertheless, the court held that the arbitration agreement was binding on both the patient and third-party beneficiaries.²⁷² First, the court found that the patient was bound by the agreement because she received benefit from it in the form of care, room, and board.²⁷³ Second, the court noted that the third-party beneficiaries were likewise bound because they replace the deceased as claimants in a wrongful death action.²⁷⁴ In *Covenant Health Rehab of Picayune, L.P.*, the court similarly found that language in the

265. See *supra* notes 134-37 and accompanying text (explaining the *Carraway* holding).

266. See *supra* note 134 and accompanying text (noting that the “passive” criteria meant that the patient did nothing to prevent her brother from acting on her behalf).

267. See *supra* note 133 and accompanying text.

268. See *supra* notes 139-152 and accompanying text (summarizing court opinions regarding third-party beneficiaries).

269. See *supra* note 139 and accompanying text (providing an example of a beneficiary bringing a wrongful death claim on behalf of the deceased patient).

270. See case cited *supra* notes 139-143 and accompanying text (suggesting that if all courts came to the same conclusion as in *Barber*, all third-party beneficiaries would be bound by arbitration agreements regardless of whether an arbitration agreement was signed at all).

271. See case cited *supra* note 140 and accompanying text.

272. See case cited *supra* note 143 and accompanying text.

273. See case cited *supra* notes 141-142 and accompanying text.

274. *Id.* (noting also that there was no determination of patient incapacity, which may have factored into the court’s decision).

arbitration agreement that was binding on the “estate” of the deceased included the third-party beneficiaries that had filed suit.²⁷⁵

By contrast, in *In re Kepka*, the court held that a wrongful death claim is personal to the statutory beneficiaries.²⁷⁶ Therefore, although the estate of the deceased would have been bound by the arbitration agreement, the wife was not bound in her individual capacity.²⁷⁷ In Mississippi, children of the deceased are forced to arbitrate, while in Texas, even a spouse may proceed to litigate a wrongful death claim.²⁷⁸ Both viewpoints illustrate the uniqueness of nursing home arbitration agreements that require special attention by courts and legislatures due to the collision of deference to arbitration, common law tort principles, statutory authority, and considerations of the health care industry.²⁷⁹

vi. Separate Signature on Arbitration Provision

Plaintiffs should be aware that they may refuse to sign the specific arbitration provisions.²⁸⁰ Courts seem willing to validate the signor’s rejection of arbitration provisions, through actions such as crossing out the language, or refusing to initial or sign near the arbitration provision, as occurred in *Bedford Care Center-Monroe Hall, LLC*.²⁸¹ Plaintiffs’ lack of understanding of their right to reject arbitration provisions seems to be their nemesis, rather than not exercising that right.²⁸²

275. See case cited *supra* notes 144-146 and accompanying text (pointing out that the court did not make a specific finding as to whether the third-party beneficiaries were deemed “heirs” or otherwise part of the “estate,” as defined in the arbitration agreement); see also *supra* note 75 and accompanying text (listing several cases in Texas that have held a wrongful death action can only be filed where the person injured would have been able to sue if he or she was still alive, but the holding does not satisfy the issue of whether third parties may be bound by arbitration).

276. See case cited *supra* notes 147-149 and accompanying text (summarizing the *In re Kepka* case).

277. *Id.*

278. See cases cited *supra* notes 139-143, 144-146, 147-149 and accompanying text (contrasting the views of Mississippi courts in finding third parties in privity to the admissions contract, with a Texas court which held that wrongful death claims are personal to the individual).

279. See *supra* notes 19, 96-121, 137-149 and accompanying text (summarizing the various federal and state statutes at issue in determining whether arbitration agreements bind third-party beneficiaries).

280. See *supra* notes 151-152 and accompanying text (highlighting the *Bedford Care Center-Monroe Hall, LLC v. Lewis* holding).

281. See *supra* note 152 and accompanying text (referencing the need to have separate documents and signatures for arbitration agreements); see also *supra* note 90 and accompanying text (inferring that had the mother crossed out the arbitration clause in the admissions contract, it may not have been enforceable).

282. See *supra* notes 73-187 and accompanying text (pointing out the various cases in which the plaintiff did not understand the arbitration provisions being signed).

In summary, case law is confusing at best as to who may make binding arbitration agreement decisions. The confusion regarding signors is compounded by the fragile nature of patients and the lack of statutory and common law guidelines to deal with a business model of arbitration in a health care setting.

2. Unconscionability

Court analysis of unconscionability is more defined than signature authority, and the common law has been sufficiently developed in the area.²⁸³ Courts have consistently held that a plaintiff must show more than a contract of adhesion to prove unconscionability, and that a contract of adhesion does not make the contract per se unconscionable.²⁸⁴

i. Procedural Unconscionability

Probably the biggest area of litigation in nursing home arbitration agreements in wrongful death claims, aside from signature issues, is procedural unconscionability.²⁸⁵ Plaintiffs routinely ask the court to deny motions to compel arbitration due to the inconspicuousness of the arbitration language, lack of explanation that the agreement meant a waiver of rights, and lack of understanding or voluntariness.²⁸⁶

The holdings from several jurisdictions present a robust set of factors that should give clear guidance to nursing homes regarding contract terms and admissions procedures.²⁸⁷ *Buraczynski v. Eyring* instructs that arbitration agreements should be on a separate document, clearly marked with bold headings, explain in capital letters that the acceptance of the agreement means a waiver of rights, and allow for revocation within thirty days.²⁸⁸ *Vicksburg Partners, L.P.* further adds that the agreement should include text drawing attention to the fact that signing the agreement is voluntary.²⁸⁹ In addition, the courts in *Miller* and *Carraway v. Beverly Enterprises Alabama, Inc.* approved of stating

283. See *supra* notes 154-160 and accompanying text (illustrating the presence of fairly clear and consistent common law rules for interpreting unconscionability, such as the need to find both procedural and substantive unconscionability in most jurisdictions and definitions of both types of unconscionability).

284. See *supra* notes 165, 206-207 and accompanying text (defining adhesion contracts as one-sided, without meaningful options).

285. See *supra* notes 161-171 and accompanying text.

286. See *supra* notes 162-171 and accompanying text (reviewing plaintiff procedural unconscionability arguments).

287. See *supra* note 162 and accompanying text (listing the factors).

288. See *supra* note 163 and accompanying text (recounting the effects of the *Buraczynski* holding and resulting factors).

289. See *supra* notes 164-165 and accompanying text (summarizing the considerations of the court in *Stephens*).

within the agreement that acceptance was not a condition for admission.²⁹⁰

External factors also bear on the court's decision to enforce the arbitration clause.²⁹¹ The illiteracy of the patient, for instance, does not render the agreement per se procedurally unconscionable.²⁹² However, the nursing home must still explain provisions to patients and allow time for questions to be answered, regardless of the patient's intelligence or sophistication.²⁹³

ii. Substantive Unconscionability

Substantive unconscionability is also well-defined at common law.²⁹⁴ It is perhaps easier to spot than procedural unconscionability, although there is still substantial litigation surrounding alleged unfair terms, such as whether limits on damages or waivers of punitive damages are unconscionable.²⁹⁵

Certain provisions are routinely declared substantively unconscionable, including: (1) placing caps on economic or non-economic damages;²⁹⁶ (2) waiving punitive damages;²⁹⁷ (3) granting a unilateral right to reject an arbitrator's decision;²⁹⁸ (4) allowing litigation for payment disputes while requiring arbitration for all other disputes;²⁹⁹ (5) requiring the party challenging the arbitration agreement to pay all costs or "loser-pay" provisions;³⁰⁰ (6) attempting to shorten the statute of limitations;³⁰¹ and (7) forfeiting all claims except those involving willful acts.³⁰²

290. *See supra* notes 166-167 and accompanying text (noting the similar finding in the cases from two different jurisdictions).

291. *See supra* notes 168-171 and accompanying text.

292. *See supra* notes 168-171 and accompanying text (finding that illiteracy was one factor among many to determine procedural unconscionability).

293. *See supra* notes 169, 171 and accompanying text (representing the general view that patients must receive adequate explanations of the terms of the contract to avoid procedural unconscionability).

294. *See supra* notes 173-174 and accompanying text (reviewing common law interpretation of substantive unconscionability as the presence of oppressive terms representing gross disparity or the altering of legal rights, as evidenced by looking at the four corners of the document).

295. *See supra* notes 177-186 and accompanying text (highlighting provisions that have been determined to be substantively unconscionable).

296. *See supra* notes 177, 181 and accompanying text.

297. *See supra* notes 177, 182 and accompanying text.

298. *See supra* note 187 and accompanying text.

299. *See supra* notes 177, 184 and accompanying text.

300. *See supra* note 185 and accompanying text.

301. *See supra* note 186 and accompanying text.

302. *See supra* note 183 and accompanying text.

However, the mere existence of an arbitration provision that requires parties to arbitrate disputes is not per se substantively unconscionable.³⁰³ Moreover, even unconscionable provisions are often severed from the arbitration agreement and the remaining terms enforced.³⁰⁴

D. Other Arguments

1. Void as Against Public Policy

Similar to unconscionability, plaintiffs argue that arbitration agreements in nursing home contracts are per se void as against public policy, although no court has concluded the same.³⁰⁵ Florida courts have extensively discussed public policy arguments.³⁰⁶ In *Blankfeld*, the court declared an arbitration agreement void against public policy when the agreement called for use of NHLA arbitration rules that required a clear and convincing standard of proof for negligent acts as opposed to the Florida statutory preponderance of the evidence standard.³⁰⁷ Because of the conflicting standards, the court found the arbitration agreement simply could not stand as void against public policy.³⁰⁸ Florida courts have since invalidated similar arbitration agreements that represent a conflicting standard of proof.³⁰⁹ Nursing homes should learn from such decisions and remove provisions that rely on a higher standard of proof.

Some courts blur the unconscionability and void as against public policy arguments.³¹⁰ In *Alterra*, the court held that a cap on non-economic damages and waiver of punitive damages were void as against public policy.³¹¹ However, the distinction is immaterial since treatment of a voided provision is similar to that of an unconscionable term—the

303. See *supra* note 178 and accompanying text (representing current precedent that mandatory arbitration provisions are not unconscionable).

304. See *supra* notes 175, 176 and accompanying text (noting that the court prefers to validate the arbitration agreement after striking unconscionable terms, but will not rewrite the agreement).

305. See *supra* notes 188-189 and accompanying text (referencing current jurisprudence relating to void as against public policy arguments and listing cases in which the court rejected the argument that arbitration agreements in nursing home contracts were void as against public policy).

306. See *supra* notes 190-197 and accompanying text (summarizing the *Blankfeld*, *Place at Vero Beach*, and *SA-PG-Ocala* holdings).

307. See *supra* notes 191-193 and accompanying text.

308. See *supra* note 195 and accompanying text.

309. See *supra* notes 196-197 and accompanying text (referring to the *Place at Vero Beach* and *SA-PG-Ocala* decisions).

310. See *supra* notes 198-200 and accompanying text.

311. *Id.*

voided provision is struck and the remainder of the agreement is upheld.³¹²

2. “Other Consideration”

Time and again, courts in various jurisdictions have rejected the “other consideration” argument.³¹³ Two grounds exist for rejection. First, the language in 42 U.S.C. § 1396r(c)(5)(A)(iii) governing Medicaid payments was intended to prohibit extra monetary fees or gifts in admissions contracts, not arbitration provisions.³¹⁴ Second, the court in *Miller* actually found consideration for an arbitration agreement in the form of a “reciprocal exchange of benefit and detriment.”³¹⁵ Under either approach, the argument appears to be unpersuasive.

3. Waiver of Arbitration Due to Being an “Active Participant”

Plaintiffs should take note of *Estate of Orlanis ex rel. Marks* in which the nursing home waived its right to arbitration by engaging in extensive discovery prior to moving to compel arbitration.³¹⁶ Often defendants will investigate options to determine their chances of success in challenging a suit versus settling the issue prior to extensive litigation costs.³¹⁷ Such investigation may amount to extensive discovery that precludes arbitration.³¹⁸

E. *Recommendations for Change*

As with any emerging area of law, many steps, both large and small, can be taken by all stakeholders to improve contract provisions and procedures. The fairly recent collision of the use of arbitration agreements, common law tort principles, statutory provisions, and health care industry standards raises significant questions regarding the validity of predispute mandatory arbitration agreements in nursing home

312. See *supra* notes 200 and accompanying text (noting that the court eliminated the offending damage provisions and validated the remainder of the agreement).

313. See *supra* notes 201-205 and accompanying text.

314. See *supra* notes 202-203 and accompanying text (noting that the court found that virtually any contract term could be argued as “other consideration” if the court started down that slippery slope).

315. See *supra* note 205 and accompanying text (finding a bargained for exchange in limiting the available forum for disputes to arbitration).

316. See case cited *supra* note 46 and accompanying text (noting that the defendant engaged in interrogatories and requested documents prior to moving to compel arbitration).

317. See *supra* notes 45-46 and accompanying text.

318. See *supra* note 46 and accompanying text.

contracts.³¹⁹ However, increased litigation also presents a ripe opportunity for any one improvement to alleviate the whole.³²⁰ Below are some suggestions to avoid collisions in the future.

1. Exclude Wrongful Death Actions from Predispute Mandatory Arbitration Agreements

First, nursing home arbitration agreements should exclude wrongful death actions from predispute mandatory arbitration provisions. A line must be drawn at requiring arbitrations for negligent acts leading to death. Neither patients nor signors can anticipate the quality of care at a nursing facility or the possible negligence that may result. Caretakers have little choice of where to take a patient with poor health. Predispute mandatory arbitration agreements encompassing wrongful death actions signed during a typically difficult admissions process pertaining to emergency health needs should be per se void as against public policy or per se unconscionable.³²¹ Wrongful death actions afford plaintiffs important opportunities to vindicate the death of their loved one. As the wronged party, the beneficiaries should be in the driver's seat, not the alleged offending party, in choosing a forum to resolve their dispute.³²²

Besides, even nursing homes are currently not receiving the benefits of some of the cost savings from arbitration agreements because courts are denying motions to compel arbitration roughly half of the time.³²³ Even successful motions to compel arbitration of wrongful death claims incur significant litigation costs.³²⁴

2. Change Current Contract Provisions and Admissions Procedures

Second, even if arbitration agreements did not exclude wrongful death actions, nursing home contracts should contain key provisions to ensure maximum understanding and fairness. Courts have given guidance on provisions and procedures that are fair to both parties.³²⁵

319. *See supra* notes 16-207 and accompanying text.

320. *See supra* notes 9-10 and accompanying text (highlighting the recent rise in nursing home litigation).

321. *See supra* notes 73-207 and accompanying text (noting the difficulties family members and caretakers have experienced interpreting paperwork while admitting a patient to a nursing home under stressful conditions).

322. *Id.* (suggesting that the rise in litigation represents a desire of beneficiaries to bring closure to the death of their loved one).

323. *See supra* note 10 and accompanying text.

324. *See supra* note 9 and accompanying text (noting that court decisions upholding arbitration agreements result in higher court costs for both plaintiff and nursing home).

325. *See supra* notes 285-304 and accompanying text.

Therefore, to avoid procedural unconscionability, arbitration agreements in nursing home contracts should include: (1) space for a signature; (2) bold typeface and clear headings; (3) clear statements about waiver of rights to a jury trial; (3) a thirty-day revocation period; (4) definitions of the authority of the respective signors; and (5) statements indicating that signing the arbitration agreement is not a condition of admissions.³²⁶

In addition, to avoid substantive unconscionability, the arbitration agreement should *not* contain the following provisions: (1) a cap on economic or non-economic damages; (2) a waiver of punitive damages; (3) a unilateral right to reject an arbitrator's decision; (4) an allowance of litigation for payment disputes while requiring arbitration for all other disputes; (5) a requirement that the party challenging the arbitration agreement pay all costs or "loser-pay" provisions; (6) a shortening of the statute of limitations; or (7) forfeiture of all claims except those involving willful acts.³²⁷ In terms of procedure, nursing homes should clearly explain the terms in the admissions process and allow an opportunity to review the agreement and ask questions.³²⁸

3. Clarify Signor Authority and What Constitutes a "Health Care" Decision

Third, signor authority must be clarified to avoid confusion for both parties regarding who may bind the patient to arbitration. Unlike contract terms that nursing homes can fix, there is less that can be done by nursing homes to ensure those in authority sign the admissions contract.³²⁹ Nursing homes are reliant on court interpretation to resolve questions of authority.³³⁰

Because the current signor titles are largely artificial, court analysis of authority should shift from the title of the signor to a proposed two-step process: (1) a determination of patient capacity; and (2) a determination of whether the patient conveyed authority to another to make contractual decisions. In addition, health care decisions should be

326. *See supra* notes 287-290 and accompanying text (discussing procedural unconscionability factors).

327. *See supra* notes 296-302 and accompanying text (analyzing provisions that have been held substantively unconscionable).

328. *See supra* note 292 and accompanying text.

329. *See supra* notes 9, 73-187 and accompanying text (noting the efforts of nursing homes to clarify the title or authority of the signor of the admissions agreement, yet the arbitration agreement was found binding in only half of the cases).

330. *See supra* notes 73-207 and accompanying text (suggesting nursing home reliance on court interpretation of the authority of the signatory and terms found to be procedurally or substantively unconscionable).

distinguished from contractual decisions, and should not include decisions to arbitrate.

Relating to a determination of capacity, courts should develop a factor test for capacity specific to nursing home patients in order to determine whether statutory, surrogate, or agency authority has been conveyed to family or non-family member signors. Patients often hover between capacity and incapacity when admitted to nursing homes.³³¹ The introduction of arbitration agreements has forced the issue of whether incapacity must be found in order to convey authority.³³² Currently courts have applied both narrow and broad standards that must be clarified.³³³

Significant to finding whether a patient has conveyed authority to another, courts must further refine apparent authority agency theory, as applied to the nursing home context. Similar to issues of determining capacity, the patient often cannot expressly grant authority to another, and passive grants of authority are largely unfair since the patient does not knowingly transfer authority.³³⁴ Apparent authority should at the very least be predicated on a physician's finding vis-a-vis capacity.

Health care decisions should not include decisions to arbitrate. Neither a health care proxy, nor medical attorney-in-fact, nor surrogate should be found by the court to possess authority to make arbitration decisions. All such statutes refer to the ability of the next of kin or proxy to make "health care" decisions. Such decisions should be narrowly defined as relating to "medical care" and should not be broadened to include non-medical care decisions absent legislation. If legislatures choose to broaden the definition, they should incorporate arbitration agreements in their statutory definitions of "health care decisions."³³⁵

4. Do Not Bind Third-Party Beneficiaries

Courts should not bind third-party beneficiaries to predispute mandatory arbitration agreements. The very nature of the wrongful death action sounds in common law theory as a vindication of loss due to the negligence of another.³³⁶ Consequently, third-party beneficiaries

331. See *supra* notes 110-121 and accompanying text.

332. See *supra* notes 115, 118-119 and accompanying text.

333. See *supra* notes 110-121 and accompanying text (noting the different court findings related to capacity).

334. See *supra* notes 122-37 and accompanying text.

335. See *supra* notes 101-107 and accompanying text (noting the statutory definitions of health care decisions in Texas and Florida).

336. See *supra* notes 1-4 and accompanying text (providing an example of a scenario in which beneficiaries sought vindication for nursing home negligence).

ought to not be bound by arbitration for future negligent acts leading to death when they are not in privity with the admissions contract.

5. Develop Federal Case Law Precedent

Finally, the United States Supreme Court should be heard on whether arbitration agreements are enforceable in nursing home contracts and under what circumstances. An increased number of cases need to make their way through the federal court system so that the Supreme Court has the opportunity to rule on the issues and guide lower courts. The conflicts in interpreting the FAA, MFA, and SSA alone warrant further guidance.³³⁷

V. CONCLUSION

In general, many actions are quite suitable for arbitration and arbitration provides a viable alternative to litigation for both plaintiff and defendant. But, predispute mandatory arbitration agreements in nursing home contracts should exclude wrongful death actions. The circumstances surrounding the admission of the patient to a nursing home are confusing at best, and no patient or signor anticipates death from the negligent acts of the nursing home. Court opinion points out that plaintiffs are not losing any rights in a well-drafted and fair admissions process but are merely changing the forum for resolution of their disputes.³³⁸ However, in wrongful death actions, the beneficiaries should be in the driver's seat when seeking vindication for negligent acts leading to the death of a loved one, such as choosing the desired forum *after* the dispute arises, not before.

In the absence of excluding wrongful death actions from nursing home arbitration agreements, many opportunities exist to ensure greater fairness in both the agreement provisions and the admissions process. Nursing homes should take cues from the courts and remove provisions from admissions agreements that are routinely held unconscionable by the courts. Courts should clarify various issues such as whether the FAA, other federal law, or state law applies, and who has authority to bind the party to arbitration upon signing the agreement. Legislatures could substantially aid in the process by defining whether "health care decisions" include agreements to arbitrate. By working together and clarifying the issues, plaintiffs, nursing homes, courts, and legislatures can improve predispute mandatory arbitration agreements in nursing

337. See *supra* notes 47-70 and accompanying text.

338. See *supra* note 189 and accompanying text.

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home admissions contracts, particularly as applied to wrongful death claims, and make the agreements “more” right.